# 80-1391

No. .....

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In The

# Supreme Court of the United States

October Term 1980

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FIRST NATIONAL BANK OF OMAHA and
FIRST OF OMAHA SERVICE CORPORATION,

*Petitioners,*

vs.

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,

*Respondent.*

—o—

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

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## QUESTIONS PRESENTED FOR REVIEW

I.

Will civil liability be imposed upon a bank which has a monopoly in the bank credit card business, and which for the sole purpose of preserving that monopoly and preventing price competition, lobbies for and obtains the passage of a state statute which it knows to be unconstitutional and which thereafter commences and prosecutes litigation which results in the issuance of an injunction enforcing the unconstitutional statute?

II.

Are 12 U. S. C. § 85 and 12 U. S. C. § 86 laws of the United States within the meaning of 42 U. S. C. § 1983?

### Parties to the Proceedings in the Lower Courts

The parties to the appeal in the United States Court of Appeals for the Eighth Circuit were: First National Bank of Omaha, a national banking association, and First of Omaha Service Corporation, a Nebraska Corporation, plaintiffs-petitioners, and The Marquette National Bank of Minneapolis, a national banking association, defendant-respondent.

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*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## OPINIONS OF THE COURTS BELOW

The Memorandum Order of the District Court is reported as *First National Bank of Omaha v. Marquette National Bank of Minneapolis,* 482 F. Supp. 514 (D. C. Minn. 1979). A copy is reproduced in the Appendix (App. p. 10). The opinion of the Eighth Circuit Court of Appeals is not yet reported.* A copy of the opinion is reproduced in the Appendix (App. p. 1).

* *First National Bank of Omaha v. The Marquette National Bank,* No. 80-1043 (8th Cir. Nov. 25, 1980).

## STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals to which this Petition is directed was entered on November 25, 1980. This Petition was filed within ninety days of that date. This court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

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## STATUTORY PROVISIONS INVOLVED IN THIS PETITION

12 U. S. C. § 85

> Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount

of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

12 U. S. C. § 86

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided,* That such action is commenced within two years from the time the usurious transaction occurred.

42 U. S. C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

———o———

## STATEMENT OF THE CASE

The First National Bank of Omaha ("First National") and its wholly owned subsidiary, First of Omaha Service Corporation ("Service Corporation"), filed their Complaint on March 1, 1979 in the United States District Court for the District of Minnesota against Marquette National Bank of Minneapolis and the St. Paul Fire & Marine Insurance Company ("Marquette") (App. p. 55). The Complaint alleged that Marquette as a part of a conspiracy in restraint of trade had, among other things, drafted and lobbied for legislation and prosecuted litigation against First National and Service Corporation (*see Marquette National Bank of Minneapolis v. First of Omaha Service Corporation,* — Minn. —, 262 N. W. 2d 358 (1977), *aff'd.* 439 U. S. 299 (1978)) with the purpose and effect of preventing First National from establishing a competing BankAmericard/Visa program in Minnesota.

The Complaint alleged seven separate claims for relief arising out of this course of conduct by Marquette. Two of the claims involved bonds posted in the prior litigation by Marquette on which St. Paul was surety. Two of the claims alleged common law torts of malicious prosecution and abuse of process. None of these claims are involved in this petition.

The other claims alleged Marquette's liability under the federal antitrust laws, under 42 U. S. C. § 1983 for deprivation under color of state law, of federally-secured rights, privileges and immunities and for the common law tort of interference with business relationships. Plaintiffs invoked the jurisdiction of the federal district court under 15 U. S. C. § 15, 28 U. S. C. §§ 1331(a), 1332(a), 1337 and 1343(a)(4).

On March 21, 1979, Marquette filed an Answer and Counterclaim (App. p. 35). On April 6, 1979, Marquette filed a "Motion to Dismiss Or, in the Alternative, for Partial Summary Judgment" (App. p. 33). The Motion was submitted to the District Court on briefs, an affidavit and oral argument on August 3, 1979.

On December 12, 1979, the District Court filed a Memorandum Order ruling on the motion (App. p. 10). The Court in that Order held that Marquette had immunity under the so-called Noerr-Pennington Doctrine for its lobbying and litigation activities, and that these activities could neither constitute nor be evidence of violations of the antitrust laws. They could not subject Marquette to liability under 42 U. S. C. § 1983 or for the tort of interference with business relationships. The Court further held that the privileges and immunities granted national banks by 12 U. S. C. § 85 and 12 U. S. C. § 86 were not within the scope of 42 U. S. C. § 1983. Accordingly, the Court granted partial summary judgment against the plaintiffs on their antitrust and tort claims to the extent that these claims were based upon Marquette's lobbying and litigation activities. The Court granted complete summary judgment against plaintiffs on their claims under 42 U. S. C. § 1983.

The District Court included the certification necessary for an interlocutory appeal under 28 U. S. C. § 1292(b). The plaintiffs filed with the Eighth Circuit Court of Appeals a timely Petition for Permission to Appeal under § 1292(b) and a Notice of Appeal as to the matters in which final judgment pursuant to F. R. C. P. 56(b) had been entered. The Eighth Circuit, on January 17, 1980,

entered its Order granting permission to appeal under 28 U. S. C. § 1292(b). The appeal was heard on September 9, 1980, and on November 25, 1980, the Circuit Court entered its Order affirming the Order of the District Court.

Since the matter was decided at the pleading stage, under the well-recognized rule that the facts, as pleaded, must be taken as true, the allegations of the complaint constitute a statement of the facts. Those allegations may be summarized as follows:

In late 1975, Marquette had a monopoly in the bank credit card business in Minnesota. It was the only card-issuing bank in that state, and over 80% of the credit cards issued to Minnesotans were issued by Marquette. At about that time, the First National Bank of Omaha attempted to introduce its Bank Americard/Visa program in Minnesota and began soliciting cardholders, merchants, and banks in Minnesota to become customers and participants in First National's program.

Marquette faced serious and potentially damaging competition from First National arising out of the fact that First National's program required no annual membership fee. Moreover, every extension of credit (excluding cash advances) under the First National program carried a period, either the first or last 25 days, within which every dollar advanced could be paid in full with no finance charges. Cardholders in the First National program who paid their accounts currently would have the use of their card free. They would pay nothing for it. If customers chose to defer payments, they would pay finance charges for all but 25 days that the charge was

outstanding computed at a rate of 1½% per month on the first $1,000 and 1% per month on amounts over that, a rate structure permitted under Nebraska law.

Marquette, on the other hand, required its cardholders to pay a $10 annual fee regardless of whether they ever used the card at all. Interest charges under Marquette's program were computed at 1% per month and, unless the entire balance was paid within 25 days, no period without such charges was available. In spite of Marquette's lower monthly finance charges on balances less than $1,000, cardholders who maintained low balances paid less for use of a card issued by First National than they would for one issued by Marquette because of Marquette's annual fee. Cardholders who carried balances averaging about $170 per year would pay the same under either program. For balances less than that, they would pay more under Marquette's program. The lower the balance the more expensive Marquette's program becomes relative to First National's.

In its initial solicitations, First National emphasized the absence of a membership fee and the price advantage to the cardholder. Marquette's response was immediate. It demanded that First National stop advertising its program as free (i. e., no annual membership fee) (App. p. 60). Marquette also made false and misleading statements about the First National program to Minnesota banks and merchants to discourage their participation in First National's program (App. p. 61). It made false accusations to National BankAmericard, Inc. ("NBI"), the BankAmericard licensing entity, about First National's program in an attempt to gain the intervention of NBI on

its behalf in keeping the First National program out of Minnesota until First National adopted a rate structure similar to Marquette's (App. p. 61). Marquette solicited complaints about First National's program from Marquette cardholders and sent these to NBI claiming that its cardholders were confused about the sponsorship of a program which carried no membership fee (App. p. 61). Though Marquette complained about First National's advertising materials, its own materials were far less adequate in showing the sponsorship of Marquette's program (App. p. 61). Marquette refused to allow its cardholders to transfer their balances to First National's program, a service which is almost routinely-performed by card-issuing banks for cardholders who desire to transfer their accounts to other card-issuing banks (App. p. 61).

In early 1976, Marquette drafted and lobbied for passage of the Bank Credit Card Act, Minn. Stat. §§ 48.185 *et seq.* through the Minnesota legislature. This law provided the means by which Marquette, the only card-issuing bank in Minnesota, could enjoin the operation of First National's program. The Act was in diametric conflict in several respects with federal laws regulating national banks and was unconstitutional and unenforceable. Marquette, itself a national bank, knew this when it drafted and lobbied the Act through the legislature (App. p. 62).

As soon as the Act became effective, Marquette sued to enjoin First National's program because that program did not conform to the interest rate structure under the Act. Through a state court injunction, Marquette was successful for almost two years in eliminating First National as a competitor. Its success ended when the United

States Supreme Court declared unanimously that the National Bank Act pre-empted the Minnesota Act and that First National's rate structure was permissible. *Marquette National Bank of Minneapolis v. First of Omaha Service Corporation*, 439 U.S. 299 (1978).

Having successfully prevented First National from competing with it for a period of two years, Marquette sold its credit card program to the Continental Illinois National Bank of Chicago in July of 1978. In doing so Marquette reaped the benefit of its success in preventing the competition which had threatened to erode its cardholder base and diminish the value of its program. Marquette's only purpose in engaging in this entire course of conduct was to preserve its monopoly and to prevent price competition from First National (App. p. 65).

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## ARGUMENT

### I.

**The decisions of the Courts below are in conflict with decisions of this Court and other Circuit Courts in holding that lobbying and litigation activities undertaken for the purpose of preventing competition cannot be the basis for imposing civil liability absent repetitive litigation, abusive or unethical conduct, such as perjury, fraud or bribery, or conduct barring meaningful access to adjudicatory tribunals.**

The Eighth Circuit adopted the District Court's opinion in this case on the Noerr-Pennington[1] issues and did not separately address them. Although the District Court's order is one granting summary judgment, the decision, accepting the pleaded facts as true, was based on the sufficiency of the allegations in the Complaint. The District Court dealt separately with the allegations relating to lobbying and those relating to litigation.

With respect to the lobbying activities, the District Court concluded:

> "Marquette was entitled to petition its state legis lature for passage of an act (even if the act was considered unconstitutional by Marquette) and is not subject to the 'sham exception' absent some allegation of illegality in the legislative process or unethical abuse of the lobbying process." *First National Bank of Omaha v. Marquette National Bank of Minneapolis*, 482 F. Supp. 514 at 519 (App. p. 20).

With respect to the litigation activities, the District Court framed the question as follows:

> "In *California Motor Transport, supra*, the United States Supreme Court applied the 'sham exception' to litigation activities where there was a pattern of baseless, repetitive claims and where the litigation resulted in barring competitors from meaningful access to adjudicatory tribunals. The question is whether these two requirements are the *sine qua non* for application of the 'sham exception' to litigation activities." *Id.* at 519 (App. p. 20).

The District Court concluded:

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1 *Eastern R. R. Conference v. Noerr Motor Freight*, 365 U. S. 127 (1961), *United Mine Workers v. Pennington*, 381 U. S. 657 (1965).

> "Accordingly, the Court finds that the institution of a single lawsuit without any allegation that the lawsuit involves unethical misconduct similar to the abuses described in *California Transport* is not sufficient to bring the defendants' actions within the 'sham exception' to the Noerr-Pennington doctrine." *Id.* at 521 (App. p. 24).

The courts below misinterpreted the decisions of this Court in *California Motor Transport v. Trucking Unlimited*, 404 U. S. 508 (1972), *Otter Tail Power v. United States*, 410 U. S. 366 (1973), and *Vendo Co. v. Lektro Vend*, 433 U. S. 623 (1977) by interpreting them as holding that improper intent or purpose in conducting lobbying or litigation is not a sufficient basis upon which to rest civil liability, but that in addition there must be a showing of repetitive, baseless litigation, unethical or abusive conduct, such as perjury, fraud or bribery, or conduct which bars meaningful access to adjudicatory tribunals.

Properly read, those cases hold that lobbying or litigation carried on, not for the purpose ostensibly sought, but as a cover for a true intent to interfere with the business of a competitor and to prevent competition or to restrain trade can be the basis for civil liability. The described conduct is of significance only to the extent that it provides evidence of the true intent of the party.

The view adopted by the courts below is also in conflict with the holdings of the United States Courts of Appeal for the Fifth and Ninth Circuits in *Feminist Women's Health Center v. Mohammed*, 586 F. 2d 530 (5th Cir.), *cert. denied*, 444 U. S. 924 (1978) and *Hahn v. Codding*, 615 F. 2d 830 (9th Cir. 1980).

The Fifth Circuit in *Feminist Women's Health Center v. Mohammed, supra,* correctly applied the earlier decisions of this Court when it said:

> "Whether the doctors' petition is immune from antitrust attack turns on the factual determination whether it was genuinely intended to influence Dr. Palmer to take official action in his capacity as Executive Director of the BOME.[6] It is the jury's task to resolve this issue."
>
> * * *
>
> "6. The court required the plaintiff to meet the high burden of proof of sham conduct suggested by the Supreme Court's opinion in Otter Tail Co. v. United States, 1973, 410 U. S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359. In Otter Tail the Court stated that antitrust liability may attach 'where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims'. 410 U. S. at 380, 93 S. Ct. at 1031. See also California Motor Transport Co. v. Trucking Unlimited, 1972, 404 U. S. 508, 513, 92 S. Ct. 609, 30 L. Ed. 2d 642. Otter Tail and California Motor Transport acknowledge that a showing of a pattern of repetitive, baseless claims is strong evidence of sham petitioning, but they do not hold that such evidence is essential to proof of sham. The Noerr doctrine presents no bar if the plaintiff proves that the petitioning was not a genuine effort to influence public officials to take governmental action. See California Motor Transport, 404 U. S. at 511-512, 92 S. Ct. 609; see generally Fischel, Antitrust Liability for Attempts to Influence Government Action. The Basis and Limits of the Noerr-Pennington Doctrine, 45 U. Chi. L. Rev. 80, 106-110 (1977). Absent clear direction from the Supreme Court, we see no reason for erecting a special, high burden of proof on this issue." *Id.* at 543.

The District Court below also held that:

> ". . . while the Noerr-Pennington doctrine evolved from antitrust claims, the First Amendment rights that it protects apply equally to other claims, including a claim for tortious interference with business relationships." (App. p. 28).

In doing so the Court recognized the constitutional basis of the Noerr-Pennington rule, but failed to recognize the concerns of this Court announced in *Noerr* when the doctrine was adopted as a matter of statutory construction of the Sherman Act. This concern was that

> ". . . such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." 365 U. S. 127 at 138.

In applying the doctrine in the context of a common law tort, the District Court must necessarily be required to face the constitutional questions. These are questions which ought to be decided only upon a complete factual record and after a careful balancing of the competing interests. They should not be decided summarily on the pleadings alone.

This raises an important constitutional question which should be decided by this Court.

This Court has previously discussed, but not decided, whether a single lawsuit brought with an improper purpose can be the basis for antitrust liability. *Vendo Co. v. Lektro Vend*, 433 U. S. 623 (1977). This is an important question which this Court should decide, particularly in view of the differences of interpretation of the meaning

and scope of the "sham" exception to the Noerr-Pennington Doctrine. This Court should resolve those differences and clarify that the question involved in the exception is the genuineness of and intent behind the complained-of activities. Such conduct, if pursued not for its ostensible purpose but for the true purpose of interfering with the business of a competitor, should be held actionable. In doing so, this Court should rule that the enumerated conduct in *California Motor Transport* is merely illustrative, and that the plaintiffs are free to offer evidence of that or other behavior for the purpose of proving that the activity was a sham.

## II.

**The decision of the Circuit Court is in conflict with the decision of this Court in Maine v. Thiboutot, — U. S. —, 65 L. Ed. 2d 555 (79-838, 1980).**

In *Maine v. Thiboutot*, — U. S. —, 65 L. Ed. 2d 555, 559 (79-838, 1980) this Court said:

> "The question before us is whether the phrase 'and laws', as used in § 1983, means what it says, or whether it should be limited to some subset of laws."

The Court answered the question:

> "Even were the language ambiguous, however, any doubt as to its meaning has been resolved by our several cases suggesting explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law."

and

> ". . . In short, Congress was aware of what it was doing, and the legislative history does not indicate that the plain language was not intended. Peti-

> tioner's arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationship among the various sections, it might have acted differently. That argument, however, can best be addressed to Congress, which it is important to note, has remained quiet in the face of our many pronouncements on the scope of § 1983 . . . ".

Although aware of that decision, the Circuit Court declined to follow it and said:

> ". . . The language in Thiboutet could be interpreted to mean that the term 'any law' as used in Section 1983 should apply Section 1983 to every deprivation of a federal statutory right. However, this pronouncement would guarantee that the violation of any federal law or the deprivation of any right provided by federal statute would create a cause of action under Section 1983. (App. p. 4).
>
> * * *
>
> "Despite the broad language of the Thiboutet opinion, we do not believe that the Supreme Court intended that the Civil Rights Act be read to create a cause of action where a state law conflicts with the National Bank Act. . . . Although it may be an exercise in semantics to argue whether the authority under Section 85 is or is not a 'right' in the abstract sense, we do not believe that such authority is a right, privilege or immunity secured by federal law within the meaning of 42 U. S. C. 1983." (App. p. 5).

The question of the scope and extent of § 1983 is an important one which has been addressed by this Court at least twice in the past two years. *See Chapman v. Houston Welfare Rights Organization*, 441 U. S. 600 (1979) and *Maine v. Thiboutot, supra.* Although this Court has spoken clearly, the dispute continues. The

Court should resolve this dispute.

## III.

**The Court of Appeals stated, as an alternative ground for dismissing the claim under § 1983, that Noerr-Pennington immunity applies to claims brought under § 1983. Whether or not such an immunity should apply and, if so, whether there should be exceptions to it, are important questions of federal law which have not been but should be decided by this Court.**

The District Court, as one of its grounds for dismissing First National's Claim under 42 U. S. C. § 1983, held that Noerr-Pennington immunity applies to claims brought under § 1983 to the same extent that it does for claims brought under the antitrust laws:

> "It appears that the Noerr-Pennington immunity which this court holds is applicable to plaintiffs' antitrust claims should also be applied to a claim based upon § 1983. Since the constitutional protection afforded the right of petition overrides the legislative objectives of the Sherman Act in this factual situation, the same immunity applies equally well to the § 1983 claim". 482 F. Supp. at 521 (App. p. 25).

The Circuit Court stated in a footnote to its opinion that this ground could be an alternative basis for affirming the dismissal of the § 1983 claim:

> "We note that the immunity from antitrust law that is recognized in permitting individuals or associations to influence legislation, *Subscription T. V., Inc. v. Southern Calif. Theatre Owners Ass'n*, 576 F. 2d 230, 232-33 (9th Cir. 1978); *Eastern RR Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U. S.

127 (1961), litigation, *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), or administrative relief, *United Mine Workers v. Pennington,* 381 U. S. 657 (1965) may also extend to allegations of section 1983 violations. The interests in protecting citizens' right of petition and free speech that were found to outweigh the statutory restrictions in those cases seem equally as strong here and could provide an alternative ground for immunizing Marquette from penalty under Section 1983. *See Missouri v. National Organization for Women, Inc.,* 620 F. 2d 1301 (8th Cir. 1980)." (App. p. 7).

We have found no other circuit court decisions extending Noerr-Pennington immunity to claims under 42 U. S. C. § 1983.

The question is whether Noerr-Pennington immunity is appropriate to § 1983 where the "color of law" requirement may be met by situations involving joint action between private citizens and state officials. *Dennis v. Sparks,* — U. S. —, 66 L. Ed. 2d 185, 79-1186 (1980). *Addickes v. Kress,* 398 U.S. 144 (1970), or situations where private citizens set state governmental processes in motion with a resulting deprivation of another's federal constitutional or statutory rights. This type of conduct could be characterized as an exercise of petition, but should it be immunized from a claim under § 1983?

This case presents the Court with an opportunity to determine the propriety of extending Noerr-Pennington immunity to claims brought under the Civil Rights laws. Whether or not it should be so extended and, if so, whether there should be exceptions and limitations to the immunity is an important question of federal law which has not been but should be decided by this Court.

## CONCLUSION

For all of the reasons set forth above the Petitioners respectfully urge the Court to grant a writ of certiorari to the Eighth Circuit Court of Appeals in order to review the questions presented herein.

Respectfully submitted,

FIRST NATIONAL BANK OF OMAHA and FIRST OF OMAHA SERVICE CORPORATION, Petitioners,

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## APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1043

FIRST NATIONAL BANK OF OMAHA, a national banking association and FIRST OF OMAHA SERVICE CORPORATION, a Nebraska corporation,

*Appellants,*

vs.

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS, a national banking association,

*Appellee,*

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Minnesota Corporation.

Appeal from the United States District Court
for the District of Minnesota

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Submitted: September 9, 1980

Filed: November 25, 1980

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Before BRIGHT, Circuit Judge, GIBSON, Senior Circuit Judge, and STEPHENSON, Circuit Judge.

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STEPHENSON, Circuit Judge.

Plaintiffs-appellants First National Bank of Omaha (First National) and First of Omaha Service Corporation (Omaha Service) brought this action seeking damages from defendant-appellee, the Marquette National Bank of

Minneapolis (Marquette). Appellants' action is based on Marquette's lobbying activity in the passage through the Minnesota legislature, in April 1976, of a twelve percent per annum interest ceiling on charges by bank credit card issuers. Additionally, they seek relief as a result of Marquette's successful injunctive suit in May 1976, against Omaha Service for its charging interest in excess of twelve percent.

Appellants advanced several theories for relief. The district court[1] granted appellees' motion to dismiss and for summary judgment. We affirm.

Appellants contend that the district court erred: (1) in granting partial summary judgment on appellants' antitrust claim on the grounds that defendant's lobbying and litigation activities were protected by the First Amendment; (2) in dismissing plaintiffs' claim under 42 U. S. C. § 1983 for failure to state a cause of action on the grounds that the defendant's lobbying and litigation activities were protected by the First Amendment, and because 12 U. S. C. §§ 85 and 86 do not give national banks "rights, privileges and immunities," and that any "rights, privileges and immunities," under 12 U. S. C. §§ 85 and 86 are not those sought to be protected by 42 U. S. C. § 1983; (3) in granting summary judgment on plaintiffs' malicious prosecution claim on the grounds that defendant had probable cause to bring its prior suit against plaintiff; (4) in dismissing plaintiff's abuse of process claim on the grounds that the process was not used to accomplish a purpose outside the

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1 The Honorable Donald D. Alsop, United States District Judge for the District of Minnesota.

prior proceeding; and (5) in granting partial summary judgment on plaintiffs' tortious interference with business claim on the grounds that defendant's lobbying and litigation activities were protected by the First Amendment.

An excellent summary of the facts appears in the district court opinion *First National Bank of Omaha v. Marquette National Bank of Minneapolis,* 482 F. Supp. 514, 515-16 (D. Minn. 1979) and need not be recited here. We have carefully examined the district court's opinion and find no error except with respect to the reasons for dismissing the 42 U. S. C. § 1983 count. Therefore, we adopt the opinion of the district court for all except its discussion of the section 1983 claim.

Quite briefly, appellants allege that Marquette violated 42 U. S. C. § 1983 by lobbying for the legislation placing an interest ceiling on bank card credit, by obtaining it, and by litigating for its enforcement. Allegedly, this is a violation because 12 U. S. C. § 85 preempts the states' power to regulate the interest of national banks. As a result, appellants contend Marquette's actions constituted a deprivation, under color of the Minnestota statute, of First National and Omaha Service's rights conveyed by 12 U. S. C. § 85.

At the time of the district court's opinion, it did not appear that section 1983 provided a cause of action for every deprivation of a federal statutory right. The primary case on this point, *Chapman v. Houston Welfare Rights Organization,* 441 U. S. 600, 615-16, 623-27, 644-46 (1979) appeared to place some limits on the breadth of section 1983. However, the Supreme Court, in a more recent case, *Maine v. Thiboutot,* 100 S. Ct. 2502, 2504-06

(1980), places these limitations in question. The language in *Thiboutot* could be interpreted to mean that the term "any law" as used in section 1983 should apply section 1983 to every deprivation of a federal statutory right.[2] However, this pronouncement would guarantee that the violation of any federal law or the deprivation of any right provided by a federal statute would create a cause of action under section 1983.

Appellants argue that Marquette's lobbying activities, designed to obtain the passage of the Minnesota statute,

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2 The majority stated in its opinion that:

> The question before us is whether the phrase "and laws," as used in § 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act.
>
> * * *
>
> Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language was not intended. Petitioners' arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationship among the various sections, it might have acted differently. That argument, however, can best be addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of § 1983.

*Maine v. Thiboutot*, 100 S. Ct. 2502, 2504-06 (footnotes omitted). This language suggests that section 1983 actions should be broadly permitted, even in areas outside welfare, First Amendment, and social security cases. However, the Court fails to say this explicitly. In light of the narrow holding in the case concerning social security cases, the general language in the opinion, and the major ramifications of such a holding, we do not think such an expansion of section 1983 is justified.

constituted a violation of federal law because the state law was contrary to 12 U. S. C. § 85. We cannot accept this assertion because 42 U. S. C. § 1983 requires state action and the deprivation of a right, privilege or immunity. Until the law was passed there was no state action. *See Weiss v. Willow Tree Civic Association,* 467 F. Supp. 803, 810 (S. D. N. Y. 1979).

Even if we concluded that state action were involved, there is an additional reason for not finding a section 1983 violation. This basis for immunity is also our rationale for finding that the passage and enforcement of the act was not a section 1983 violation.

Despite the broad language of the *Thiboutot* opinion, we do not believe that the Supreme Court intended that the Civil Rights Act be read to create a cause of action where a state law conflicts with the National Bank Act. That Act establishes a broad national system of regulation of the banking industry. One section of the Act establishes the rate of interest that national banks may charge on loans. 12 U. S. C. § 85. This section authorizes national banks to collect interest at the rate allowed to the most favored lender in the state in which the national bank is located. *First National Bank in Mena v. Nowlin,* 509 F. 2d 872, 880 (8th Cir. 1975). This section, in effect, uses state law as the substitute for federal law in measuring permissible interest rates. *See Roper v. Consurve, Inc.,* 578 F. 2d 1106, 1115 (5th Cir. 1978), *cert. denied,* 440 U. S. 945 (1979). Although it may be an exercise in semantics to argue whether the authority under section 85 is or is not a "right" in the abstract sense, we do not believe that such authority is a right, privilege or immunity secured by federal law within the meaning of 42 U. S. C. § 1983.

A bank's ability to charge a certain rate of interest, incidental to a broad regulatory scheme, is not in the nature of the rights protected by the Civil Rights Act. The civil rights statutes were passed for the purpose of "ensuring a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto." *Chapman v. Houston Welfare Rights Organization,* 441 U. S. 600, 611 (1979). The Supreme Court decision in *Thiboutot* makes clear that section 1983 does protect rights established by statutes enacted pursuant to authority other than the Fourteenth Amendment. The opinion, however, does not change the type of statutory rights protected by section 1983. *Thiboutot* involved the rights of individuals pursuant to a federally-created welfare program. These rights of beneficiaries to receive minimal subsistence and support under the AFDC program so as to be able to obtain food and shelter represent important personal rights akin to fundamental rights protected by the Fourteenth Amendment. As the Fifth Circuit wrote in a similar context, "[s]uch fundamental human, highly personalized rights are just the stuff from which § 1983 claims are to be made." *Gomez v. Florida State Employment Service,* 417 F. 2d 569, 579 (5th Cir. 1969) (section 1983 action for violation of rights under Wagner-Peyser Act). On the other hand, rights incidental to the National Bank Act are qualitatively different and not within the contemplation of section 1893.

Justice Powell, dissenting in *Thiboutot,* notes that the majority opinion "does not consider the nature or scope of

the litigation it has authorized."[3] 100 S. Ct. at 2513 (Powell, J. dissenting). The Supreme Court's holding that section 1983 provides a cause of action for interference with rights under the Social Security Act does not represent a significant departure from prior case law or expansion into areas unrelated to the interests protected by the Fourteenth Amendment. A holding by this court, establishing a cause of action for interference with rights pursuant to the National Bank Act, would represent a dramatic and unwarranted extension of the Civil Rights Act. We do not believe that such a departure is mandated by the opinion in *Thiboutot* or that such a cause of action was within the intent of the Congress that enacted the civil rights statutes. We, therefore, hold that state interference wih the authority of national banks under 12 U. S. C. § 85 does not give rise to a cause of action under 42 U. S. C. § 1983.[4]

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3 The majority opinion relies primarily on cases litigating statutory claims arising under the Social Security Act. *See* 100 S. Ct. at 2504-05. The dissent criticizes the majority as likely authorizing federal litigation against state officers whenever a person claims injury arising from any of a plethora of federal-state cooperative programs. *Id.* at 2513 (Powell, J. dissenting). It is our view that section 1983 does not authorize a suit for an alleged violation of a purely economic regulatory statute affecting only commercial institutions as is the case here.

4 We note that the immunity from antitrust law that is recognized in permitting individuals or associations to influence legislation, *Subscription T. V., Inc. v. Southern Calif. Theatre Owners Ass'n*, 576 F. 2d 230, 232-33 (9th Cir. 1978); *Eastern RR Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), litigation, *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508 (1972), or administrative relief, *United Mine Workers v. Pennington*, 381 U. S. 657 (1965)

(Continued on next page)

We recognize that a literal reading of 42 U. S. C. § 1983 in light of the *Thiboutot* case might result in a finding that Marquette's activity was violative of section 1983. Yet, we cannot accept the assertion that Congress intended to prohibit good faith lobbying, legislation and litigation. We find this to be especially true in a case involving economic regulation and where the interaction between 12 U. S. C. § 85 and the Minnesota law was so much in doubt.[5]

In a case such as this where there has been good faith throughout the passage and enforcement of a law involving economic and business regulation and in an area of great turmoil concerning the validity of the state law, it is repugnant to our rights of free speech and petition to penalize the party who ultimately loses the battle. To hold

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(Continued from previous page)

may also extend to allegations of section 1983 violations. The interests in protecting citizens' right of petition and free speech that were found to outweigh the statutory restrictions in those cases seem equally as strong here and could provide an alternative grounds for immunizing Marquette from penalty under section 1983. *See Missouri v. National Organization for Women, Inc.*, 620 F. 2d 1301 (8th Cir. 1980).

5 The Minnesota act was passed in April 1976, yet it was not until the second Fisher case in 1977, *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284 (7th Cir. 1976), *cert. denied*, 429 U. S. 1062 (1977) (Fisher I); *Fisher v. First National Bank of Omaha*, 548 F. 2d 255 (8th Cir. 1977) (Fisher II), that the courts fully appreciated the protections of 12 U. S. C. § 85. Furthermore, in light of the United States Supreme Court's granting of certiorari in litigation involving the enforcement of the Minnesota act, *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 262 N. W. 2d 358 (D. Minn. 1977), *cert. granted*, 436 U. S. 916 (1978), *aff'd*, 439 U. S. 299 (1978), there was continued doubt of the effect of 12 U. S. C. § 85 until well into 1978. Therefore, it was not until the Fisher cases and the review of the law involved in the present case that the "rights, privileges, and immunities" conveyed by 12 U. S. C. § 85 were fully understood.

otherwise would intolerably chill the legislative and judicial processes and restrict functions that are fundamental to our form of government while extending the coverage of section 1983 beyond that intended by Congress. Therefore, we find that the lobbying, passage and enforcement of the Minnesota law was immune from section 1983 violation.

In conclusion, we hold that the district court did not err in granting summary judgment and dismissing the non-42 U. S. C. § 1983 counts raised by First National or Omaha Service. Its dismissal of the section 1983 claim was also proper for the reasons stated above.

Affirmed.

A true copy.

Attest:

CLERK U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-79 Civ. 94

FIRST NATIONAL BANK OF OMAHA, a national banking association, and FIRST OF OMAHA SERVICE CORPORATION, a Nebraska corporation,

*Plaintiffs,*

vs.

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS, a national banking association, and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Minnesota corporation,

*Defendants.*

MEMORANDUM ORDER

Mackall, Crounse & Moore, by CLAY R. MOORE, Esq., Minneapolis, Minnesota, and Swarr, May, Smith & Anderson, by WILLIAM E. MORROW, JR., Esq., and DONALD J. BURESH, Esq., Omaha, Nebraska, appeared for plaintiffs.

Levitt, Palmer, Bowen, Bearmon & Rotman, by J. PATRICK McDAVITT, Esq., Minneapolis, Minnesota, appeared for defendants.

This matter comes before the court upon the motion of the defendants to dismiss the First, Second, Third, Fourth and Fifth Claims for Relief, to the extent that these claims are based upon lobbying and litigation activities, for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12 (b) (6)) or in the alternative for partial summary judgment (Fed. R. Civ. P. 56) on these claims. Briefs were submitted by both parties and oral argument was heard on August 3, 1979.

## BACKGROUND

The present suit is an outgrowth of prior litigation in which the roles of the litigants were the reverse of the above caption. *See The Marquette National Bank of Minneapolis, et al. v. First of Omaha Service Corporation,* — Minn. —, 262 N. W. 2d 358 (1977), *cert. granted,* 436 U. S. 916 (1978), *aff'd.,* — U. S. —, 99 S. Ct. 540, 58 L. Ed 2d 534 (1978).

Plaintiff First National Bank of Omaha ("First National") is a national bank with its charter address in Omaha, Nebraska. It operates a bank credit card program ("Omaha BankAmericard/VISA program") in various states, including the State of Minnesota, with the assistance of its wholly owned subsidiary, Plaintiff First of Omaha Service Corporation ("Service Corporation"). Defendant The Marquette National Bank of Minneapolis ("Marquette") is a national bank with its charter address in Minneapolis, Minnesota, which, until 1978, also operated a bank credit card program ("Marquette's BankAmericard/VISA program") in the State of Minnesota.

In the latter part of 1975, plaintiff's began a systematic effort in the State of Minnesota to enroll residents, merchants and banks in the Omaha BankAmericard/VISA program. At that time, Marquette had a virtual monopoly in the bank credit card business in Minnesota. It was the only card issuing bank in that state and over 80% of the credit cards issued to Minnesotans were issued by Marquette.

The interest rate structure of the program solicited by plaintiffs was 18 percent per year on the first $999.99

and 12 percent per year on amounts of $1,000.00 and over. At that time, Marquette's interest rate structure on its BankAmericard/VISA program was a flat 12 percent per year. Marquette also charged a membership fee of $10.00 per year, while First National's program required no annual membership fee.

In April, 1976, the Minnesota Legislature enacted the Bank Credit Card Act which established a 12 percent per annum maximum interest rate for bank credit card programs. This statute applied to any national bank doing business in Minnesota and provided injunctive relief for any bank operating in compliance with the statute when injured competitively by another bank which was violating the statute. It is undisputed that Marquette engaged in lobbying activities in connection with the passage of the Bank Credit Card Act.

In May, 1976, Marquette commenced an injunction suit against First National alleging that the latter was operating its bank card program without conforming to the interest rate limitations established by the Bank Credit Card Act. Shortly thereafter, the injunction suit was removed to this court by First National. Marquette subsequently filed a voluntary dismissal of the complaint as to First National, and this court then remanded the suit to state court for lack of subject matter jurisdiction.

The Hennepin County District Court then entered a temporary restraining order and later a permanent injunction enjoining the Omaha Service Corporation from operating its program in violation of the Bank Credit Card Act. Marquette was required to post a $10,000

bond as security for the issuance of the temporary restraining order.

The Minnesota Supreme Court rejected an attempt by the Service Corporation to stay the permanent injunction. On November 10, 1977, the Minnesota Supreme Court reversed the permanent injunction in a decision which produced three dissents. However, the Minnesota Supreme Court granted a stay of judgment pending application for a writ of certiorari to the United States Supreme Court on the condition that Marquette post a bond of $10,000 as security.

The United States Supreme Court rendered its final decision in the case on December 18, 1978. It affirmed the Minnesota Supreme Court's decision on the basis that, under 12 U. S. C. A. § 85, First National was authorized to charge the rate of interest permitted under the laws of the State of Nebraska notwithstanding the provisions of the Bank Credit Card Act.

The present suit was commenced on March 1, 1979, in the form of a multicount complaint against Marquette and its surety on the injunction bonds, St. Paul Fire and Marine Insurance Company. In the First, Second, Third, Fourth and Fifth Claims for Relief, plaintiffs assert causes of action under theories of antitrust, civil rights, malicious prosecution, abuse of process and tortious interference with business. Under the Sixth and Seventh Claims for Relief, the Service Corporation seeks recovery from defendants of such damages as may be due and owing pursuant to the two $10,000 bonds filed by Marquette in the injunction suit.

Marquette seeks dismissal or partial summary judgment of the First, Second, Third, Fourth and Fifth Claims for Relief asserted in the complaint, to the extent that such claims are based upon Marquette's lobbying and litigation activities. This motion does not involve the Sixth and Seventh Claims for Relief. Since Marquette has submitted the affidavit of J. Patrick McDavitt and corresponding exhibits attached thereto, the court will treat the present motion as one for summary judgment pursuant to Rule 12 (b) of the Fed. R. Civ. P.

When considering a motion for summary judgment, all facts must be viewed in the light most favorable to the party opposing the motion, and that party is entitled to the benefit of all reasonable inferences to be drawn from the facts. *Robert Johnson Grain Co. v. Chemical Interchange Co.*, 541 F. 2d 207 (8th Cir. 1976). Also, the right to judgment must be shown with such clarity as to leave no room for controversy and it must appear that the plaintiff would not be entitled to recover under any discernible circumstances. *Minnesota Bearing Co. v. White Motor Corp.*, 470 F. 2d 1323 (8th Cir. 1973).

## THE ANTITRUST CLAIM

The First Claim for Relief alleges that Marquette violated sections 1 and 2 of the Sherman Act. Plaintiffs allege, among other things, that Marquette was instrumental in drafting and lobbying for passage of the Bank Credit Card Act, and that it did so with the intent to prevent price competition. They further allege that Marquette knew that the Bank Credit Card Act was unconstitutional, and that Marquette's lobbying activities consti-

tuted a sham to cover what was nothing more than an attempt to interfere directly with First National's business.

Plaintiffs further claim that Marquette commenced the injunction suit knowing that the Bank Credit Card Act could not be constitutionally applied to the First National and that Marquette continued the injunction suit as a deliberate and malicious sham and scheme, for the sole purpose of preventing effective price competition from First National.

For purposes of the present motion, all of the allegations in the complaint pertaining to the motives and intent behind Marquette's lobbying and litigation activities shall be taken as true. Even assuming these allegations to be true, Marquette nevertheless asserts that it is entitled to judgment as a matter of law as to these activities.

Any claim founded upon alleged wrongful conduct arising out of lobbying or litigation activities faces a threshold conflict with the constitutionally protected rights of petition and assembly. In the context of the antitrust laws, the constitutional immunity flowing from the right of petition was first enunciated by the United States Supreme Court in *Eastern Railroad Conference v. Noerr Motor Freight*, 365 U. S. 127 (1961). In *Noerr* the court stated that:

> The Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. 365 U. S. at 136.

In a later case, the United States Supreme Court again applied the antitrust immunity derived from the right of petition in a case involving a successful effort to influence government administrative action. *See United Mine Workers v. Pennington,* 381 U. S. 657 (1965).

Finally, in *California Motor Transport Co. v. Trucking Unlimited,* 404 U. S. 508 (1972), the United States Supreme Court held that the *Noerr-Pennington* immunity also applied to anticompetitive attempts to influence the judicial branch of government by way of litigation activities.

There is no real question in this case that Marquette's lobbying and litigation activities are generally the type of activities protected from the antitrust laws by the *Noerr-Pennington* doctrine. The dispute is whether or not First National has stated a cause of action against Marquette under the "sham exception" to the *Noerr-Pennington* doctrine.

In *Noerr,* the United States Supreme Court expressly recognized an exception to the immunity afforded lobbying activities:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor and the application of the Sherman Act would be justified. 365 U. S. at 144.

The "Sham exception" was first applied by the United States Supreme Court in *California Motor Transport v. Trucking Unlimited, supra.* The court there held that the "sham exception" was applicable to the defendant's litiga-

tion activities because these activities "were used to harass and deter the plaintiffs in their use of administrative and judicial proceedings so as to deny them full and unlimited access to those tribunals." A second factor for application of the "sham exception" was that the defendants had engaged in a pattern of baseless, repetitive claims which indicated that the administrative and judicial processes were abused.

*Marquette's Lobbying Activities*

With regard to Marquette's lobbying activities, the issue presented to the court is whether those activities were a genuine effort to influence legislation or whether they were instead a mere sham conducted for the purpose of interfering directly with First National's business. In addressing this issue, the intent and motives of Marquette in relation to its lobbying activities are not a decisive factor. The court in *Noerr* stated that:

> The fact that the railroad's sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors . . . even if adequately supported in the record, could not transform conduct otherwise lawful into a violation of the Sherman Act. . . . The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot be made to depend upon their intent in doing so. 365 U. S. at 138-139. *Also see United Mine Workers of America v. Pennington,* 381 U. S. 657 (1965) and *Mark Aero, Inc. v. Trans World Airlines, Inc.,* 580 F. 2d 288 (8th Cir. 1978).

The court must accept as true plaintiffs' allegations that Marquette engaged in the lobbying activities in question solely for the purpose of preventing competition.

However, the court is convinced that that type of intent is irrelevant to the issue of whether or not Marquette's activities fall within the sham exception.

Plaintiffs cite *California Motor Transport, supra,* in support of their claim that motive or intent is crucial in determining whether or not the "sham exception" is applicable. However, reliance upon *California Motor Transport* for that proposition is misplaced. The court in *California Motor Transport* stated that purpose or intent to deprive competitors of meaningful access to the agencies or courts is a factor to be considered in determining the applicability of the "sham exception." However, plaintiffs here have not alleged any purpose or interest on the part of the defendants to deprive the plaintiffs of access to courts or agencies or any other purpose or intent to unethically misuse the lobbying or litigation processes. Clearly, plaintiffs' allegation that Marquette engaged in lobbying activities solely for the purpose of preventing competition is not sufficient to bring the "sham exception" into play and is precisely the type of intent deemed irrelevant under the *Noerr-Pennington* doctrine.

The United States Supreme Court in *Noerr* stated that the "sham exception" did not apply in that case because the lobbying activities were highly successful. The court indicated that the success of the lobbying efforts was sufficient to show a genuine attempt to influence legislation rather than an effort solely directed to interfere with a competitor's business relationship.

The Seventh and Ninth Circuits of the United States Court of Appeals have directly addressed this factor and have held that a successful lobbying effort establishes that

there was a genuine effort to influence legislative action. *See Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F. 2d 220 (7th Cir. 1975) and *Subscription T. V. v. Southern California Theater Owners*, 576 F. 2d 230 (9th Cir. 1978).

In *Metro Cable, supra*, the Court of Appeals for the Seventh Circuit affirmed the dismissal of a complaint which alleged that defendants had successfully persuaded the Rockford City Council to award an exclusive cable television franchise to defendants and to refuse plaintiff's applications for such a franchise. In holding the "sham exception" inapplicable, the court stated:

> In the case at bar, there is no conceivable basis for arguing that defendants' conduct was a sham rather than a genuine effort to influence legislative action. Plaintiff's injury was caused by the governmental action which defendants genuinely attempted to secure and succeeded in securing. 516 F. 2d at 232.

Marquette's lobbying activities similarly do not fall within the "sham exception" to the *Noerr-Pennington* doctrine. Marquette simply exercised its right of petition and was successful in obtaining passage of the Bank Credit Card Act. Plaintiffs have not alleged that Marquette committed any unethical acts in connection with its lobbying activities. Clearly, First National's injury was caused by the passage of the Bank Credit Card Act and not by any "abuse" of the lobbying process by Marquette. Application of the "sham exception" in such a situation would effectively preclude any party from petitioning its legislative body when passage of the act sought would interfere with a competitor's business. The Sherman Act was not intended to inhibit, in such a manner, the First Amendment right to petition.

Plaintiffs finally argue that the "sham exception" is applicable if it can be shown that the Bank Credit Card Act was unconstitutional and known by Marquette to be unconstitutional. A similar argument was rejected in *Subscription T. V. v. Southern California Theater Owners*, 576 F. 2d 230 (9th Cir. 1978), where the court said:

> The *Noerr-Pennington* doctrine is based on the First Amendment right of petition and such a right would be considerably chilled by a rule which would require an advocate to predict whether the desired legislation would withstand a constitutional challenge in the courts and to expose itself to a potential treble damage antitrust action based upon that prediction. 576 F. 2d at 233.

The court agrees with the reasoning of the court in *Subscription T. V.* Marquette was entitled to petition its state legislature for passage of an act (even if the act was considered unconstitutional by Marquette), and is not subject to the "sham exception" absent some allegation of illegality in the legislative process or unethical abuse of the lobbying process. *See Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F. 2d 288 (8th Cir. 1978).

*Marquette's Litigation Activities*

The next issue presented to the court is whether the "sham exception" is applicable to Marquette's litigation activities. In *California Motor Transport, supra*, the United States Supreme Court applied the "sham exception" to litigation activities where there was a pattern of baseless, repetitive claims and where the litigation resulted in barring competitors from meaningful access to adjudicatory tribunals. The question is whether these two re-

quirements are the *sine qua non* for application of the "sham exception" to litigation activities.

The United States Supreme Court has not yet decided whether litigation activity in the context of one lawsuit is conduct which is subject to the "sham exception." In *California Motor Transport,* the court stated:

> One claim, which a court or agency may think baseless, may go unnoticed, but a pattern of baseless, repetitive claims may emerge which leads the fact-finder to conclude that the administrative and judicial processes have been abused. 404 U. S. at 513.

The question of the applicability of the "sham exception" to a single lawsuit was subsequently considered by some members of the court in *Vendo Co. v. Lektro-Vend Corp.,* 433 U. S. 623 (1977). In *Vendo,* a single state court case formed the basis of a subsequent antitrust claim in the federal court by the state court defendant against the state court plaintiff. The federal court in the antitrust case had enjoined the state court plaintiff from collecting a judgment which it won in the state court case.

The United States Supreme Court reversed in a decision that produced no majority opinion. The plurality opinion announced by Mr. Justice Rehnquist and joined by Justices Stewart and Powell, was grounded upon the Anti-Injunction Act. Footnote Six of the plurality opinion contains ambiguous language concerning whether one lawsuit is sufficient under the "sham exception."

Mr. Justice Blackmun, joined by Chief Justice Burger, filed a concurring opinion in which they stated that one lawsuit is not sufficient to fall within the "sham ex-

ception" and that there must be a pattern of baseless, repetitive claims.

A dissenting opinion written by Mr. Justice Stevens, in which Justices Brennan, White and Marshall joined, took the position that a single lawsuit could violate the antitrust laws and rejected any reading of *California Transport* to require a pattern of repetitive lawsuits.

Several courts have interpreted *California Transport* as requiring a pattern of repetitive lawsuits before the "sham exception" may be invoked. *See Central Bank of Clayton v. Clayton Bank*, 424 F. Supp. 163 (E. D. Mo. 1976), *aff'd*, 553 F. 2d 102 (8th Cir. 1976), *cert. denied*, 433 U. S. 910 (1977) and *Mountain Grove Cemetery v. Norwalk Vault Co.*, 428 F. Supp. 951 (D. Conn. 1977).

On the other hand, several other courts have interpreted *California Transport* and *Vendo* as holding that the "sham exception" can be applied to a case involving a single lawsuit and that a pattern of repetitive claims is not required. *See Associated Radio Service Company v. Page Airways, Inc.*, 414 F. Supp. 1088 (N. D. Tex. 1976); *Cyborg Systems, Inc. v. Management Science America, Inc.*, 1978-1 Trade Cases § 61,927 (N. D. Ill. 1978) and *Colorado Petroleum Marketers Assoc. v. Southland Corp.*, 476 F. Supp. 373 (D. Col. 1979).

Upon reviewing the relevant cases in this area, the court concludes that one lawsuit may be sufficient in some cases to bring a defendant's conduct within the "sham exception" to the *Noerr-Pennington* doctrine. The court's reference in *California Transport* to "a pattern of baseless, repetitive lawsuits" appears to be a reference to the probative value of one claim versus a pattern of claims.

However, based upon the factual circumstances of this case and the allegations made by the plaintiffs in the complaint, the court concludes that the prior lawsuit brought by Marquette against First National is not sufficient to bring Marquette's litigation activities within the "sham exception" to the *Noerr-Pennington* doctrine.

Plaintiffs have not satisfied the second factor considered by the courts in deciding the applicability of the "sham exception." Plaintiffs in *California Transport, supra,* alleged that defendants deterred them in their use of administrative and judicial proceedings so as to deny them free and unlimited access to those tribunals. The United States Supreme Court decided that these allegations were sufficient to state a claim because they amounted to an abuse of the administrative and judicial processes.

In *California Transport,* Justice Douglas also described several other types of conduct which, if used as part of an effort to influence government action, could result in an antitrust violation. The specific practices cited were perjury, use of a fraudulent patent, illegal conspiracy with a licensing authority and bribery.

> The Tenth Circuit has interpreted this passage to mean that, in order for behavior to be within the sham exception, it must involve fraud, corruption or misuse of the state processes. *Mountain Grove Cemetery v. Norwalk Vault Co.*, 428 F. Supp. 951 at 954 (D. Conn. 1977).

In the present case, plaintiffs have not made any assertion that Marquette sought to bar its competitors from meaningful access to adjudicatory tribunals, that the Injunction suit was part of a pattern of baseless, repetitive claims or that there was any unethical or abusive conduct

(*e. g.*, perjury, fraud or bribery) involved in the lobbying and litigation activities. Plaintiffs do not allege that Marquette attempted to use legislative and judicial processes to directly cause some result other than that which was expressly sought and obtained in the lobbying and litigation activities. Plaintiffs alleged injury was a direct consequence of the enactment and enforcement of the Bank Credit Card Act and is not alleged to have been caused by any misuse or abuse of the legislative or judicial process.

> The critical distinction drawn by the court in *California Transport* is between the concerted effort to influence public officials regardless of intent and purpose and the concerted effort to abuse the judicial or administrative process. *Associated Radio Service Company v. Page Aairways, Inc.*, 414 F. Supp. 1088 at 1096 (N. D. Tex. 1976). *See also Wilmorite, Inc. v. Eagan Real Estate, Inc.*, 454 F. Supp. 1124 (1977).

Accordingly, the court finds that the institution of a single lawsuit without any allegations that the lawsuit involves unethical misconduct similar to the abuses described in *California Transport* is not sufficient to bring the defendants' actions within the "sham exception" to the *Noerr-Pennington* doctrine.

## THE CIVIL RIGHTS CLAIM

Plaintiffs Second Claim for Relief asserts a cause of action under 42 U. S. C. A. § 1983 for injuries sustained as a result of the Injunction Suit. Jurisdiction for the § 1983 claim is predicated on 28 U. S. C. A. § 1331 (a) and 28 U. S. C. A. § 1343 (4). This claim alleges that plaintifls were deprived of their right under 12 U. S. C. A. § 85 to charge finance charges or interest at a rate permitted by the law of the State of Nebraska.

In *Chapman v. Houston Welfare Rights Organization*, — U. S. —, 60 L. Ed. 2d 508 (1979), the United States Supreme Court held that an action seeking relief under 42 U. S. C. A. § 1983 cannot utilize 28 U. S. C. A. § 1343 (3) and (4) as its jurisdictional basis unless it arises out of the violation of a federal statute which provides for the protection of civil rights or equal rights. Since 12 U. S. C. A. § 85 does not provide for the protection of civil rights or equal rights, jurisdiction cannot be predicated on 28 U. S. C. A. § 1343 (4). However, the various opinions in *Chapman* indicate that a majority of the court would probably allow jurisdiction for a § 1983 claim under 28 U. S. C. A. § 1331 (a), assuming the § 1331 requirements are met. Accordingly, jurisdiction for this claim will be allowed under 28 U. S. C. A. § 1331 (a).

It appears that the *Noerr-Pennington* immunity which this court holds is applicable to plaintiffs' antitrust claim should also be applied to a claim based upon § 1983. Since the constitutional protection afforded the right of petition overrides the legislative objectives of the Sherman Act in this factual situation, the same immunity applies equally well to the § 1983 claim. *See* "Constitutional Law: Right to Petition Rationale of Noerr-Pennington Doctrine Applied in Construction of Section 1985 (1) of Civil Rights Act," 17 Washburn L. J. 202 (1978).

In *Stern v. United States Gypsum, Inc.*, 547 F. 2d 1329 (7th Cir. 1977), *cert. denied*, 434 U. S. 975 (1977), the plaintiff was an Internal Revenue Agent who brought a § 1985 claim alleging a conspiracy between United States Gypsum and its officers to prevent plaintiff from discharging his lawful duties as a federal employee by making

fabricated, false and defamatory charges to plaintiff's superiors concerning plaintiff's conduct of a tax audit. In dismissing the complaint on the grounds that recognition of such a cause of action would interfere with defendant's right of petition, the court stated:

> We realize of course, that § 1985 (1), as we have construed it, literally could be applied here. To do so, however, would produce such problematic results that we decline to assume Congress, on a silent record and in response to very different circumstances, intended them . . . Finding that Sherman Act liability in such circumstances would raise important constitutional problems involving the right to petition, and seeing no basis whatever in the legislative history for concluding Congress intended to raise such questions, the Court (in *Noerr*) held that the (Sherman) Act could not be applied. This mode of analysis seems to us appropriate here. . . . 547 F. 2d at 1344.

The court agrees with the analysis used by the court in *Stern, supra,* and concludes that the reasoning used by that court for a § 1985 action is equally applicable to an action under § 1983. Marquette's activities are not the type of activities normally condemned by the Civil Rights Act and liability based upon § 1983 would raise important constitutional problems involving the right to petition.

Even if the *Noerr-Pennington* doctrine did not preclude the § 1983 cause of action, there are several other reasons why this cause of action is insufficient. 42 U. S. C. A. § 1983 may provide a cause of action for deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States. In the Injunction Suit, the United States Supreme Court held that § 85 of the National Bank Act authorizes national banks to

charge rates of interest in accordance with laws of the state where its principal office is located. However, it does not follow from this holding that § 85 of the National Bank Act secures "a right, privilege and immunity" within the meaning of the Civil Rights Act. The court holds that it does not.

Even if § 85 did create a "right, privilege and immunity" within the meaning of § 1983, it is not clear that violation of such a "right" would create a cause of action under § 1983. The United States Court of Appeals for the Eighth Circuit stated in *Chase v. McMasters,* 573 F. 2d 1011 (8th Cir. 1978) that "subsequent cases have made it clear that a § 1983 action does not exist for every violation of a federal statute." In *Chapman v. Houston Welfare Rights Organization,* — U. S. —, 60 L. Ed. 2d 508 (1979), four of the Justices indicated that § 1983 provides a cause of action for deprivations of all federal statutory rights. However, three of the Justices stated that § 1983 provides a cause of action only for deprivations of federal statutory rights which provide for "equal rights" or "the protection of civil rights." The court is of the opinion that the latter position is more in accordance with the legislative history behind § 1983.

Accordingly, plaintiffs do not state a claim under § 1983 since § 85 of the National Bank Act does not provide for "equal rights" or "the protection of civil rights," nor does it provide economic assistance to minorities as was the case of the statute in *Chase v. McMasters, supra.*

* * *

## INTERFERENCE WITH BUSINESS CLAIM

Plaintiffs' Fifth Claim for Relief asserts a common law theory of interference with contract or business expectancy. To the extent that this claim is based upon Marquette's lobbying activities and prosecution of the Injunction Suit, Marquette is entitled to judgment as a matter of law because these activities are protected under the *Noerr-Pennington* doctrine and do not fall with the "sham exception."

> When a suit based on interference with advantageous relationship is brought against a party whose "interference" consisted of petitioning a governmental body to alter its previous policy a privilege is created by the guarantee of the First Amendment . . . and they cannot be required to compensate another for loss occasioned by a change in policy should they be successful. *Sierra Club v. Butz*, 349 F. Supp. 934 at 938 (N. D. Calif. 1972).

Several recent cases have stated that while the *Noerr-Pennington* doctrine evolved from antitrust claims, the First Amendment rights that it protects apply equally to other claims including a claim for tortious interference with business relationships. *See Pennwalt Corp. v. Zenith Laboratories, Inc.*, 472 F. Supp. 413 (E. D. Mich. 1979) and *State of Missouri v. National Organization for Women, Inc.*, 467 F. Supp. 289 (W. D. Mo. 1979). The court agrees with this analysis since to hold otherwise would effectively chill the defendants' First Amendment rights.

The court determines that, to the extent that plaintiffs' claims are based upon lobbying and litigation activities, there are no genuine issues as to any material facts and the defendants are entitled to judgment as a matter

of law. The court is of the opinion that the order herein entered involves a controlling question of law as to which there is substantial ground for differences of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, all pursuant to 28 U. S. C. A. § 1292 (b).

Upon the foregoing,

IT IS ORDERED That the motion of the defendants for partial summary judgment (pursuant to Rule 56 of the Fed. R. Civ. P.) as to the First, Second, Third, Fourth and Fifth Claims for Relief be and hereby is granted to the extent that such claims are based upon the lobbying and litigation activities of the defendants.

IT IS FURTHER ORDERED That as to the First and Fifth Claims for Relief, the court determines pursuant to Rule 54 (b) of the Fed. R. Civ. P. that there is no just reason for delay and partial summary judgment shall be entered as follows:

> The plaintiffs shall take nothing from the defendant Marquette National Bank of Minneapolis on the First and Fifth Claims for Relief to the extent that such claims are based upon the lobbying and litigation activities of that defendant.

IT IS FINALLY ORDERED That as to the Second, Third, and Fourth Claims for Relief, the court determines pursuant to Rule 54 (b) of the Fed. R. Civ. P. that there is no just reason for delay and judgment shall be entered as follows:

> The plaintiffs shall take nothing from the defendant Marquette National Bank of Minneapolis on the Second, Third and Fourth Claims for Relief and that

defendant shall have its costs and disbursements as taxed and allowed.

DATED: December 11, 1979.

/s/ Donald D. Alsop

United States District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-79-94

First National Bank of Omaha, a national banking association, and First of Omaha Service Corporation, a Nebraska corporation,

*Plaintiffs*,

vs.

The Marquette National Bank of Minneapolis, a national banking association, and St. Paul Fire and Marine Insurance Company, a Minnesota corporation,

*Defendants.*

AFFIDAVIT OF J. PATRICK McDAVITT

*State of Minnesota, County of Hennepin, ss.*

J. PATRICK McDAVITT, being first duly sworn, deposes and says that:

1. He is an attorney duly admitted to practice before the United States District Court for the District of Minnesota and a member of the law firm of Levitt, Palmer, Bowen, Bearmon & Rotman, counsel for defendants in the above-entitled matter.

2. He is one of the attorneys who represented The Marquette National Bank of Minneapolis ("Marquette") in that certain litigation entitled *The Marquette National Bank of Minneapolis, et al. v. First of Omaha Service Corporation,* — Minn. —, 262 N. W. 2d 358 (1977), *cert. granted,* 436 U. S. 916, 98 S. Ct. 2261, 56 L. Ed. 2d 757 (1978), *aff'd,* — U. S. —, 99 S. Ct. 540, 58 L. Ed. 2d 534 (1978). *See also same case, The Marquette National Bank of Minneapolis v. First National Bank of Omaha, et al.* (Civil No. 4-76-251), 422 F. Supp. 1346 (D. Minn. 1976). This prior litigation is hereinafter referred to as the "Injunction Suit."

3. In the course of that stage of the Injunction Suit when it was before the United States Supreme Court, an Appendix was filed pursuant to Rule 36 of the Supreme Court Rules. The aforesaid Appendix contains a true and correct printing of most of the relevant documents from the record in the Injunction Suit. A copy of said Appendix is submitted herewith and made a part hereof as Exhibit 1.

4. In the course of that stage of the Injunction Suit when it was before the Minnesota Supreme Court, a stay of judgment pursuant to 28 U. S. C. § 2101 (f) was requested by Marquette to enable it to file a petition for writ of certiorari to the United States Supreme Court. Marquette suggested to the Minnesota Supreme Court that the amount of the bond required to be filed in connection with said stay be limited to $10,000. In a letter to the Minnesota Supreme Court dated November 25, 1977, counsel for plaintiffs herein requested that the amount of the bond be fixed at "not less than $500,000.00" based upon an

affidavit of James Doody, Vice President of First National Bank of Omaha ("First National"), asserting that First National would suffer a loss in its business if said stay of judgment were entered. Copies of the aforesaid letter and accompanying affidavit are attached hereto and made a part hereof as Exhibits 2 and 3.

5. Sometime in May, 1978, prior to the United States Supreme Court's grant of certiorari in the Injunction Suit, First National commenced another solicitation of the Omaha BankAmericard/VISA program in the State of Minnesota. Pursuant to a letter dated May 25, 1978, addressed to the Minnesota Attorney General, counsel for First National stated that until such time as the courts permitted First National to charge Nebraska rates, First National intended to operate its BankAmericard/VISA program at an interest rate of 1 percent per month on the outstanding balances. A copy of this May 25, 1978 letter ies attached hereto and made a part hereof as Exhibit 4.

6. By a letter dated June 14, 1978, Marquette notified counsel for plaintiffs herein, the Minnesota Supreme Court, and the United States Supreme Court that Marquette had entered into an agreement for the sale of its BankAmericard/VISA program and, following consummation thereof, would not be in a position to pursue its claim for injunctive relief. A copy of this June 14, 1978 letter is attached hereto and made a part hereof as Exhibit 5.

/s/ J. Patrick McDavitt

Subscribed and sworn to before
me this 18th day of May, 1979.

/s/ Margaret M. Le Duc
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-79-94

First National Bank of Omaha, a national banking association, and First of Omaha Service Corporation, a Nebraska corporation,

*Plaintiffs,*

vs.

The Marquette National Bank of Minneapolis, a national banking association, and St. Paul Fire and Marine Insurance Company, a Minnesota corporation,

*Defendants.*

NOTICE OF MOTION AND MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT

To: Plaintiffs First National Bank of Omaha and First of Omaha Service Corporation and their attorneys, Clay R. Moore, Mackall, Crounse & Moore, 1000 First National Bank Building, Minneapolis, Minnesota 55402, and William E. Morrow, Jr. and Donald J. Buresh, Swarr, May, Smith & Andersen, 3535 Harney Street, Omaha, Nebraska 68131.

YOU WILL PLEASE TAKE NOTICE that defendant, The Marquette National Bank of Minneapolis ("Marquette"), will move the above-named Court before the Honorable Donald D. Alsop in Court Room 4 at the United States Court House in the City of St. Paul, Minnesota, on the 1st day of June, 1979 at 9:30 a.m., or as soon thereafter as counsel can be heard for an Order of dismissal or, in the alternative, for partial summary judgment, as to the First, Second, Third, Fourth and

Fifth Claims for Relief alleged in the Complaint. Said motion is made pursuant to Rule 12(b) and Rule 56(b) and (d) of the Federal Rules of Civil Procedure on grounds that, to the extent the aforesaid claims are based upon lobbying activities in connection with the enactment of the Minnesota Bank Credit Card Act, or upon that certain injunction suit against plaintiff First of Omaha Service Corporation to enforce the provisions of said Act, plaintiffs have failed to state a cause of action upon which relief can be granted and Marquette is entitled to judgment as a matter of law.

Dated: April 11, 1979

Levitt, Palmer, Bowen, Bearmon & Rotman

Matthew J. Levitt
John Troyer
J. Patrick McDavitt

By /s/ J. Patrick McDavitt

*Attorneys for Defendant The Marquette National Bank of Minneapolis*

500 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: 339-0661

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-79-94

First National Bank of Omaha, a national banking association, and First of Omaha Service Corporation, a Nebraska corporation,

*Plaintiffs,*

vs.

The Marquette National Bank of Minneapolis, a national banking association, and St. Paul Fire and Marine Insurance Company, a Minnesota corporation,

*Defendants.*

SEPARATE ANSWER AND COUNTERCLAIM
OF THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS

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ANSWER

For its separate answer to the Complaint herein, defendant The Marquette National Bank of Minneapolis ("Marquette"), by its attorneys, states as follows:

I. *The Parties*

I-1. Marquette admits the allegations of Paragraph I-1 of the Complaint.

I-2. Marquette admits the allegations of Paragraph I-2 of the Complaint.

I-3. Marquette admits the allegations contained in the first sentence of Paragraph I-3 of the Complaint but denies the remaining allegations of said paragraph.

I-4. Marquette admits the allegations of Paragraph I-4 of the Complaint.

II. *First Claim for Relief*
(Antitrust)

II-1. In answer to Paragraph II-1 of the Complaint, Marquette realleges Paragraphs I-1 through I-3 of its Answer.

II-2. In answer to Paragraph II-2 of the Complaint, Marquette admits that plaintiffs' First Claim for Relief purports to be filed and instituted under Sections 1, 2 and 15 of Title 15 of the United States Code; and, that plaintiffs seek to invoke jurisdiction under Section 15 of Title 15, United States Code, Section 1337 of Title 28, United States Code, and Section 1331(a) of Title 28, United States Code. Marquette denies each and every other allegation of Paragraph II-2 of the Complaint.

II-3. Marquette admits the allegations of Paragraph II-3 of the Complaint.

II-4. In answer to Paragraph II-4 of the Complaint, Marquette admits that it was a card-issuing member bank in the BankAmericard/VISA system but states that it is without knowledge or information sufficient to form a belief as to the remaining allegations of said paragraph.

II-5. In answer to Paragraph II-5 of the Complaint, Marquette admits that plaintiff First of Omaha Service Corporation ("Service Corporation") functions as an agent of First National but states that Marquette is without knowledge or information sufficient to form a belief

as to the truth of the remaining allegations of said paragraph.

II-6. In answer to Paragraph II-6 of the Complaint, Marquette admits that in the latter part of 1975, First National and Service Corporation began a systematic and continuous effort to solicit persons residing in Minnesota to become cardholders for the First National Bank-Americard/VISA program and that said solicitation was done by, among other means, direct mail and telephone contact.

II-7. In answer to Paragraph II-7 of the Complaint, Marquette admits that in connection with this solicitation effort, Service Corporation proposed to solicit merchants and banks in Minnesota to become participants in a First National BankAmericard/VISA program by entering into agreements of the type alleged in Paragraph II-5 of the Complaint.

II-8. Answering Paragraph II-8 of the Complaint, Marquette admits that the 1975 solicitations of First National and Service Corporation offered credit terms based upon the interest rates allegedly permitted under the laws of the State of Nebraska and Section 85 of Title 12, United States Code. Marquette is without knowledge or information sufficient to form a belief as to the rate structure and finance charges actually imposed by First National in connection with the operation of its Bank-Americard/VISA program in the State of Minnesota.

II-9. Marquette admits the first and third sentences of Paragraph II-9 of the Complaint and admits that it charged a finance charge equal to 1 percent per month (12 percent annual percentage rate).

II-10. Marquette denies the allegations of Paragraph II-10 of the Complaint.

II-11. In answer to Paragraph II-11 of the Complaint, Marquette admits that the business and activities of First National in connection with the conduct of its BankAmericard/VISA program in the State of Minnesota involved the interstate trade and commerce of the United States.

II-12. Marquette denies the allegations of Paragraph II-12 of the Complaint.

II-13. Except as indicated below, Marquette denies the allegations of Paragraph II-13 of the Complaint. Marquette admits and alleges that it requested First National to clearly and conspicuously identify itself on mailing pieces sent to Minnesota residents and to conform its solicitations to the requirements of the Minnesota Bank Credit Card Act, Minnesota Statutes, § 48.185. Marquette admits that it engaged in lobbying activities in connection with passage of the Minnesota Bank Credit Card Act, Minnesota Statutes, § 48.185. Marquette admits that it commenced an action in the Hennepin County District Court of Minnesota (Civil File No. 726526); in which action the State of Minnesota intervened as a co-plaintiff, seeking, among other things, to invoke the injunctive provisions of Minnesota Statutes, § 48.185 against plaintiffs' violation of said statute; that following plaintiffs' attempt to remove said action to United States District Court and to dismiss the same against First National pursuant to the National Bank Venue Statute (12 U. S. C. § 94), Marquette voluntarily dismissed its action against First National without prejudice and the remain-

ing action against Service Corporation was remanded back to the Hennepin County District Court for lack of federal jurisdiction; that on December 22, 1976, the Hennepin County District Court entered a temporary restraing order enjoining Service Corporation, and all persons acting as officers, employees or agents thereof, from any activity in violation of Minnesota Statutes, § 48.185 until further order of the Court; that on December 31, 1976, the Minnesota Supreme Court denied Service Corporation's petition for a writ of prohibition restraining the Hennepin County District Court from enforcing said temporary restraining order; that on February 22, 1977, the Hennepin County District Court entered judgment and a permanent injunction enjoining Service Corporation, and all persons acting as officers, employees or agents thereof, from any activity in violation of Minnesota Statutes, § 48.185; that on November 10, 1977, the Minnesota Supreme Court (with three justices dissenting) filed its decision to reverse the judgment and permanent injunction entered by the Hennepin County District Court; that on December 8, 1977, the Minnesota Supreme Court granted Marquette a stay of judgment pending application for writ of certiorari to the United States Supreme Court and conditioned upon the filing of a bond in the amount of $10,000; that on December 14, 1977, the Minnesota Supreme Court entered judgment reversing the judgment and permanent injunction of the Hennepin County District Court; that on May 22, 1978, the United States Supreme Court granted petitions for writs of certiorari filed on behalf of Marquette and on behalf of the State of Minnesota to review the aforesaid decision of the Minnesota Supreme Court; and that, on

December 18, 1978, the United States Supreme Court unanimously affirmed the decision of the Minnesota Supreme Court. Marquette admits that in June, 1978, it entered into an agreement for the sale and transfer of its BankAmericard/VISA credit card program to the Continental Illinois National Bank and Trust Company of Chicago.

II-14. Marquette denies the allegations of Paragraph II-14 of the Complaint.

II-15. Marquette denies the allegations of Paragraph II-15 of the Complaint.

II-16. Marquette denies the allegations of Paragraph II-16 of the Complaint.

II-17. Except as hereinabove expressly admitted, Marquette generally and specifically denies each and every other allegation contained in plaintiffs' First Claim for Relief.

II-18. As an affirmative defense to plaintiffs' First Claim for Relief, Marquette states and alleges that the Complaint fails to state a claim against Marquette upon which relief can be granted.

II-19. As an affirmative defense to plaintiffs' First Claim for Relief, Marquette states and alleges that its lobbying actions in connection with the passage of Minnesota Statutes, § 48.185 are protected under the First Amendment and other applicable provisions of the United States Constitution and under the Constitution of the State of Minnesota.

II-20. As an affirmative defense to plaintiffs' First Claim for Relief, Marquette states and alleges that its

actions in connection with attempting to enforce by judicial proceedings the provisions of Minnesota Statutes, § 48.185 are protected under the First Amendment and other applicable provisions of the United States Constitution and under the Constitution of the State of Minnesota.

II-21. As an affirmative defense to plaintiffs' First Claim for Relief, Marquette states and alleges that to the extent that plaintiffs' claim purports to be based upon Marquette acting in combination and concert with officials of the State of Minnesota, said actions constitute the exercise of a valid government function and are otherwise protected under the Constitutions of the United States and the State of Minnesota.

II-22. As an affirmative defense to plaintiffs' First Claim for Relief, Marquette states and alleges that plaintiff First National lacks standing to object to the actions taken by Marquette in connection with the enforcement of Minnesota Statutes, § 48.185 against plaintiff Service Corporation.

II-23. As an affirmative defense to plaintiffs' First Claim for Relief, Marquette states and alleges, upon information and belief, that from 1975 to the present plaintiffs have conducted and continue to conduct a BankAmericard/VISA program in the State of Minnesota. By reason of the foregoing, plaintiffs are estopped from asserting said claim and have waived any purported right to same.

II-24. As an affirmative defense to plaintiffs' First Claim for Relief, Marquette states and alleges, upon information and belief, that from approximately November,

1975 to approximately July, 1976 plaintiffs engaged in BankAmericard/VISA solicitations in the State of Minnesota. On or about July 29, 1976, Service Corporation voluntarily agreed not to conduct any further solicitations in the State of Minnesota without giving written notice to Marquette of its intention to do so. Said agreement by Service Corporation remained in effect until it was revoked by Service Corporation as of December 15, 1976. By reason of the foregoing, plaintiffs are estopped from asserting the aforesaid claim against Marquette and have waived any purported right to same.

II-25. As an affirmative defense to plaintiffs' First Claim for Relief, Marquette states and alleges that First National has never been enjoined from soliciting, offering or operating a BankAmericard/VISA program in the State of Minnesota. If First National has refrained from any activity in connection with the conduct of a BankAmericard/VISA program in the State of Minnesota, it was as a result of First National's own voluntary decision. By reason of the foregoing, First National is estopped from asserting the aforesaid claim against Marquette and has waived any purported right to same.

II-26. As an affirmative defense to plaintiffs' First Claim for Relief, Marquette states and alleges that plaintiffs have never been enjoined from soliciting, offering or operating a BankAmericard/VISA program in the State of Minnesota in accordance with the interest rate limitations of Minnesota Statutes, § 48.185. If plaintiffs have refrained from any activity in connection with the conduct of a BankAmericard/VISA program in the State of Minnesota, it was as a result of plaintiffs' own voluntary

decision. By reason of the foregoing, plaintiffs are thereby estopped from asserting the aforesaid claim against Marquette and have waived any purported right to same.

II-27. As an affirmative defense to plaintiffs' First Claim for Relief, Marquette states and alleges, upon information and belief, that beginning in May, 1978, or earlier, plaintiffs resumed their BankAmericard/VISA solicitations in the State of Minnesota; and, that following the receipt of certain complaints from the Attorney General for the State of Minnesota with respect to said solicitations, plaintiffs voluntarily consented to abide by the interest rate limitations of Minnesota Statutes, § 48.185. If plaintiffs have refrained from any activity in connection with the conduct of a BankAmericard/VISA program in the State of Minnesota, it was in response to complaints from the Attorney General for the State of Minnesota and a result of plaintiffs' own voluntary decision to refrain from such activity based upon said complaints. By reason of the foregoing, plaintiffs are estopped from asserting the aforesaid claim against Marquette and have waived any purported right to same.

II-28. As an affirmative defense to plaintiffs' First Claim for Relief, Marquette states and alleges that plaintiffs have failed to properly mitigate any purported damages which they claim to have suffered.

II-29. As an affirmative defense to plaintiffs' First Claim for Relief, Marquette states and alleges that any purported damages sought by plaintiffs are wholly speculative.

II-30. As an affirmative defense to plaintiffs' First Claim for Relief, Marquette states and alleges that any

purported damages incurred by plaintiff Service Corporation resulting from the temporary restraining order, permanent injunction, and stay of judgment referred to in Paragraph II-13 of this Answer are limited in amount to the two $10,000 bonds referred to in the Sixth and Seventh Claims for Relief stated in the Complaint.

WHEREFORE, as to plaintiffs' First Claim for Relief, Marquette prays that judgment be entered dismissing said claim against Marquette with prejudice.

III. *Second Claim for Relief*

(Section 1983 of Title 42, United States Code)

III-1. In answer to Paragraph III-1 of the Complaint, Marquette realleges Paragraphs I-1 through I-3, Paragraphs II-3 through II-9, and Paragraph II-13 of its Answer which are incorporated by reference herein as if they had been set forth in full.

III-2. Marquette admits that this Second Claim for Relief purports to be filed and instituted under Section 1983 of Title 42, United States Code; and that plaintiff seeks to invoke jurisdiction under Sections 1331(a) and 1332(a) of Title 28, United States Code and Section 1343(4) of Title 28, United States Code. Marquette denies that such jurisdiction exists herein.

III-3. In answering Paragraph III-3 of the Complaint, Marquette admits that, in accordance with the December 18, 1978 decision of the United States Supreme Court referred to in Paragraph II-13 of this Answer, Section 85 of Title 12, United States Code permits First National to charge interest on its loans at the rates al-

lowed to lenders generally under the laws of Nebraska, the state in which First National is located.

III-4. Marquette denies the allegations of Paragraph III-4 of the Complaint.

III-5. In answering Paragraph III-5 of the Complaint, Marquette admits that, subject to the aforesaid decision of the United States Supreme Court, the Minnesota Credit Card Act, Minnesota Statutes, § 48.185 ("the Minnesota Act") establishes the finance charges which national banks may charge to Minnesota residents in connection with bank credit card programs such as the Bank-Americard/VISA program.

III-6. In answer to Paragraph III-6 of the Complaint, Marquette admits that the Minnesota Act authorizes a bank extending credit in a bank credit card program in compliance with the rate structure prescribed by the Minnesota Act, to institute a civil action for an injunction prohibiting any violation of the Minnesota Act.

III-7. In answer to Paragraph III-7 of the Complaint, Marquette admits that in accordance with the provisions of the Minnesota Act, Marquette commenced an action in the Hennepin County District Court of Minnesota, in which action the State of Minnesota intervened as a co-plaintiff with Marquette, to enjoin any violations of the Minnesota Act; and, that a temporary restraining order and a permanent injunction were issued by the Hennepin CountyDistrict Court enjoining Service Corporation, and all persons acting as officers, employees or agents thereof, from any activity in violation of the Minnesota Act.

III-8. Marquette denies the allegations of Paragraph III-8 of the Complaint.

III-9. Marquette denies the allegations of Paragraph III-9 of the Complaint.

III-10. Marquette denies the allegations of Paragraph III-10 of the Complaint.

III-11. Except as hereinabove expressly admitted, Marquette generally and specifically denies each and every other allegation contained in plaintiffs' Second Claim for Relief.

III-12. As an affirmative defense to plaintiffs' Second Claim for Relief, Marquette states and alleges that the Complaint fails to state a claim against Marquette upon which relief can be granted.

III-13. As an affirmative defense to plaintiffs' Second Claim for Relief, Marquette states and alleges that its actions in connection with attempting to enforce by judicial proceedings the provisions of Minnesota Statutes, § 48.185 are protected under the First Amendment and other applicable provisions of the United States Constitution and under the Constitution of the State of Minnesota.

III-14. As an affirmative defense to plaintiffs' Second Claim for Relief, Marquette states and alleges that to the extent that plaintiffs' claim purports to be based upon Marquette acting in combination and concert with officials of the State of Minnesota, said actions constitute the exercise of a valid government function and are otherwise protected under the Constitutions of the United States and the State of Minnesota.

III-15. As an affirmative defense to plaintiffs' Second Claim for Relief, Marquette states and alleges that plaintiff First National lacks standing to object to the actions taken by Marquette in connection with the enforcement of Minnesota Statutes, § 48.185 against plaintiff Service Corporation.

III-16. As an affirmative defense to plaintiffs' Second Claim for Relief, Marquette states and alleges, upon information and belief, that from 1975 to the present plaintiffs have conducted and continue to conduct a BankAmericard/VISA program in the State of Minnesota. By reason of the foregoing, plaintiffs are estopped from asserting said claim and have waived any purported right to same.

III-17. As an affirmative defense to plaintiffs' Second Claim for Relief, Marquette states and alleges, upon information and belief, that from approximately November, 1975 to approximately July, 1976 plaintiffs engaged in BankAmericard/VISA solicitations in the State of Minnesota. On or about July 29, 1976, Service Corporation voluntarily agreed not to conduct any further solicitations in the State of Minnesota without giving written notice to Marquette of its intention to do so. Said agreement by Service Corporation remained in effect until it was revoked by Service Corporation as of December 15, 1976. By reason of the foregoing, plaintiffs are estopped from asserting the aforesaid claim against Marquette and have waived any purported right to same.

III-18. As an affirmative defense to plaintiffs' Second Claim for Relief, Marquette states and alleges that First National has never been enjoined from soliciting,

offering or operating a BankAmericard/VISA program in the State of Minnesota. If First National has refrained from any activity in connection with the conduct of a BankAmericard/VISA program in the State of Minnesota, it was as a result of First National's own voluntary decision. By reason of the foregoing, First National is estopped from asserting the aforesaid claim against Marquette and has waived any purported right to same.

III-19. As an affirmative defense to plaintiffs' Second Claim for Relief, Marquette states and alleges that plaintiffs have never been enjoined from soliciting, offering or operating a BankAmericard/VISA program in the State of Minnesota in accordance with the interest rate limitations of Minnesota Statutes, § 48.185. If plaintiffs have refrained from any activity in connection with the conduct of a BankAmericard/VISA program in the State of Minnesota, it was as a result of plaintiffs' own voluntary decision. By reason of the foregoing, plaintiffs are thereby estopped from asserting the aforesaid claim against Marquette and have waived any purported right to same.

III-20. As an affirmative defense to plaintiffs' Second Claim for Relief, Marquette states and alleges, upon information and belief, that beginning in May, 1978, or earlier, plaintiffs resumed their BankAmericard/VISA solicitations in the State of Minnesota; and, that following the receipt of certain complaints from the Attorney General for the State of Minnesota with respect to said solicitations, plaintiffs voluntarily consented to abide by the interest rate limitations of Minnesota Statutes, § 48.185. If plaintiffs have refrained from any activity

in connection with the conduct of a BankAmericard/ VISA program in the State of Minnesota, it was in response to complaints from the Attorney General for the State of Minnesota and a result of plaintiffs' own voluntary decision to refrain from such activity based upon said complaints. By reason of the foregoing, plaintiffs are estopped from asserting the aforesaid claim against Marquette and have waived any purported right to same.

III-21. As an affirmative defense to plaintiffs' Second Claim for Relief, Marquette states and alleges that plaintiffs have failed to properly mitigate any purported damages which they claim to have suffered.

III-22. As an affirmative defense to plaintiffs' Second Claim for Relief, Marquette states and alleges that any purported damages sought by plaintiffs are wholly speculative.

III-23. As an affirmative defense to plaintiffs' Second Claim for Relief, Marquette states and alleges that any purported damages incurred by plaintiff Service Corporation resulting from the aforesaid temporary restraining order, permanent injunction, and stay of judgment are limited in amount to the two $10,000 bonds referred to in the Sixth and Seventh Claims for Relief stated in the Complaint.

WHEREFORE, as to plaintiffs' Second Claim for Relief, Marquette prays that judgment be entered dismissing said claim against Marquette with prejudice.

* * *

VI. *Fifth Claim for Relief*

(Interference)

VI-1. In answering Paragraph VI-1 of the Complaint; Marquette realleges Paragraphs I-1 through I-3, Paragraphs II-3 through II-10, Paragraphs II-12 through II-13 of its Answer as if they had been set forth in full.

VI-2. Marquette admits that this Fifth Claim for Relief purports to be filed and instituted under Section 1332(a) of Title 28, United States Code. Marquette denies that such jurisdiction exists herein.

VI-3. Marquette is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph VI-3 of the Complaint.

VI-4. Marquette denies the allegations of Paragraph VI-4 of the Complaint.

VI-5. Marquette denies the allegations of Paragraph VI-5 of the Complaint.

VI-6. Marquette denies the allegations of Paragraph VI-6 of the Complaint.

VI-7. Marquette denies the allegations of Paragraph VI-7 of the Complaint.

VI-8. Except as hereinabove expressly admitted, Marquette generally and specifically denies each and every other allegation contained in plaintiffs' Fifth Claim for Relief.

VI-9. As an affirmative defense to plaintiffs' Fifth Claim for Relief, Marquette states and alleges that the Complaint fails to state a claim against Marquette upon which relief can be granted.

VI-10. As an affirmative defense to plaintiffs' Fifth Claim for Relief, Marquette states and alleges that its lobbying actions in connection with the passage of Minnesota Statutes, § 48.185 are protected under the First Amendment and other applicable provisions of the United States Constitution and under the Constitution of the State of Minnesota.

VI-11. As an affirmative defense to plaintiffs' Fifth Claim for Relief, Marquette states and alleges that its actions in connection with attempting to enforce by judicial proceedings the provisions of Minnesota Statutes, § 48.185 are protected under the First Amendment and other applicable provisions of the United States Constitution and under the Constitution of the State of Minnesota.

VI-12. As an affirmative defense to plaintiffs' Fifth Claim for Relief, Marquette states and alleges that to the extent that plaintiffs' claim purports to be based upon Marquette acting in combination and concert with officials of the State of Minnesota, said actions constitute the exercise of a valid government function and are otherwise protected under the Constitutions of the United States and the State of Minnesota.

VI-13. As an affirmative defense to plaintiffs' Fifth Claim for Relief, Marquette states and alleges that plaintiff First National lacks standing to object to the actions taken by Marquette in connection with the enforcement of Minnesota Statutes, § 48.185 against plaintiff Service Corporation.

VI-14. As an affirmative defense to plaintiffs' Fifth Claim for Relief, Marquette states and alleges, upon in-

formation and belief, that from 1975 to the present plaintiffs have conducted and continue to conduct a BankAmericard/VISA program in the State of Minnesota. By reason of the foregoing, plaintiffs are estopped from asserting said claim and have waived any purported right to same.

VI-15. As an affirmative defense to plaintiffs' Fifth Claim for Relief, Marquette states and alleges, upon information and belief, that from approximately November, 1975 to approximately July, 1976 plaintiffs engaged in BankAmericard/VISA solicitations in the State of Minnesota. On or about July 29, 1976, Service Corporation voluntarily agreed not to conduct any further solicitations in the State of Minnesota without giving written notice to Marquette of its intention to do so. Said agreement by Service Corporation remained in effect until it was revoked by Service Corporation as of December 15, 15, 1976. By reason of the foregoing, plaintiffs are estopped from asserting the aforesaid claim against Marquette and have waived any purported right to same.

VI-16. As an affirmative defense to plaintiffs' Fifth Claim for Relief, Marquette states and alleges that First National has never been enjoined from soliciting, offering or operating a BankAmericard/VISA program in the State of Minnesota. If First National has refrained from any activity in connection with the conduct of a BankAmericard/VISA program in the State of Minnesota, it was as a result of First National's own voluntary decision. By reason of the foregoing, First National is estopped from asserting the aforesaid claim against Marquette and has waived any purported right to same.

VI-17. As an affirmative defense to plaintiffs' Fifth Claim for Relief, Marquette states and alleges that plaintiffs have never been enjoined from soliciting, offering or operating a BankAmericard/VISA program in the State of Minnesota in accordance with the interest rate limitations of Minnesota Statutes, § 48.185. If plaintiffs have refrained from any activity in connection with the conduct of a BankAmericard/VISA program in the State of Minnesota, it was as a result of plaintiffs' own voluntary decision. By reason of the foregoing, plaintiffs are thereby estopped from asserting the aforesaid claim against Marquette and have waived any purported right to same.

VI-18. As an affirmative defense to plaintiffs' Fifth Claim for Relief, Marquette states and alleges, upon information and belief, that beginning in May, 1978, or earlier, plaintiffs resumed their BankAmericard/VISA solicitations in the State of Minnesota; and, that following the receipt of certain complaints from the Attorney General for the State of Minnesota with respect to said solicitations, plaintiffs voluntarily consented to abide by the interest rate limitations of Minnesota Statutes, § 48.185. If plaintiffs have refrained from any activity in connection with the conduct of a BankAmericard/VISA program in the State of Minnesota, it was in response to complaints from the Attorney General for the State of Minnesota and a result of plaintiffs' own voluntary decision to refrain from such activity based upon said complaints. By reason of the foregoing, plaintiffs are estopped from asserting the aforesaid claim against Marquette and have waived any purported right to same.

VI-19. As an affirmative defense to plaintiffs' Fifth Claim for Relief, Marquette states and alleges that plaintiffs have failed to properly mitigate any purported damages which they claim to have suffered.

VI-20. As an affirmative defense to plaintiffs' Fifth Claim for Relief, Marquette states and alleges that any purported damages sought by plaintiffs are wholly speculative.

VI-21. As an affirmative defense to plaintiffs' Fifth Claim for Relief, Marquette states and alleges that any purported damages incurred by plaintiff Service Corporation resulting from the temporary restraining order, permanent injunction, and stay of judgment referred to in Paragraph II-13 of this Answer are limited in amount to the two $10,000 bonds referred to in the Sixth and Seventh Claims for Relief in the Complaint.

WHEREFORE, as to plaintiffs' Fifth Claim for Relief, Marquette prays that judgment be entered dismissing said claim against Marquette with prejudice.

* * *

Dated: March 21, 1979

LEVITT, PALMER, BOWEN, BEARMON & ROTMAN

By /s/ Matthew J. Levitt

By /s/ John Troyer

By /s/ J. Patrick McDavitt

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

FIRST NATIONAL BANK OF OMAHA, a national banking association, and FIRST OF OMAHA SERVICE CORPORATION, a Nebraska Corporation,

*Plaintiffs,*

vs.

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS, a national banking association, and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Minnesota Corporation,

*Defendants.*

COMPLAINT

JURY TRIAL IS DEMANDED

I. *The Parties*

I-1. The Plaintiff, First National Bank of Omaha (First National) is a national banking association organized and existing under the laws of the United States and located in Omaha, Nebraska.

I-2. The Plaintiff, First of Omaha Service Corporation (Service Corporation) is a Nebraska corporation having its principal place of business in Omaha, Nebraska. It is a wholly owned subsidiary of First National.

I-3. The Defendant, The Marquette National Bank of Minneapolis (Marquette) is a national banking association organized and existing under the laws of the United States and located in Minneapolis, Minnesota. All claims for relief stated herein are applicable to this Defendant.

I-4. The Defendant St. Paul Fire and Marine Insurance Company (St. Paul) is a Minnesota Corporation

having its principal place of business in St. Paul, Minnesota. Only claims for relief VII and VIII are applicable to this Defendant.

II. *First Claim for Relief*

(Anti-trust)

II-1. Paragraphs I-1 through I-3 are incorporated by reference in this First Claim for Relief as if they had been set forth in full.

II-2. This First Claim for Relief is brought under Sections 1, 2 and 15 of Title 15 of the United States Code to recover treble damages for the injury to the business and property of plaintiffs sustained by reason of defendant's violations of Sections 1 and 2 of Title 15, United States Code. The jurisdiction of the court is invoked under Section 15 of Title 15, United States Code, under Section 1337 of Title 28, United States Code and under Section 1331 (a) of Title 28, United States Code, the matter is controversy exclusive of interest and costs being in excess of $10,000.

II-3. The BankAmericard plan, now known as VISA, (BankAmericard/VISA) is a national and international bank credit card system which enables persons holding BankAmericard/VISA credit cards to purchase goods and services from participating merchants and obtain cash advances from participating banks throughout the United States and the World.

II-4. First National at all times material to this Complaint and Marquette, until on or about July or August of 1978, were card issuing member banks in the BankAmeri-

card/VISA system. As such, they entered into written agreements with cardholders under which they issued BankAmericard/VISA credit cards to their cardholders and extended credit to their cardholders in the following manner: Cardholders wishing to purchase goods or services or obtain cash advances with their BankAmericard/VISA credit card execute BankAmericard/VISA forms which when authenticated by their card are exchanged with a participating merchant, or bank in the case of cash advances, for goods, services, or cash respectively. The forms are then forwarded by the merchant, or bank through the system to First National or Marquette for acceptance and payment. The amount of the payment is then charged to the account of the cardholder. The cardholder may exercise the option under this agreement to defer payments on the account and pay finance charges for the privilege of doing so.

II-5. Service Corporation functions as an agent of First National under a written contract. Under that contract it participates in the system by entering into written agreemens with merchants and banks. Banks having such an agreement with Service Corporation do not have authority to issue cards or extend credit. Rather, they advertise the First National BankAmericard/VISA program, solicit applications from prospective cardholders for the program, which are subject to acceptance or rejection by First National, and serve as depositories for BankAmericard/VISA sales drafts deposited by participating merchants with whom Service Corporation has agreements.

II-6. In the latter part of 1975, First National began a systematic effort to solicit persons residing in Minnesota to become cardholders for the First National BankAmeri-

card/VISA program. This solicitation was done by direct mail solicitation and telephone contact.

II-7. In connection with this solicitation effort, Service Corporation proposed to solicit merchants and banks in Minnesota to become participants in the First National BankAmericard/VISA program by entering into agreements of the type alleged in paragraph II-5, so that all parts of the system would function and be operable in Minnesota.

II-8. First National in its solicitations offered credit terms based upon the interest rates allowed to it under Section 85 of Title 12, United States Code (hereinafter the Nebraska rate structure). Under this rate structure First National renders periodic statements to its cardholders and charges finance charges on unpaid balances of the cardholder's account. The finance charges are assessed at the rate of one and one-half percent per month on the first $999.99 of the account for an annual percentage rate of 18%, and one percent per month on amounts of $1,000 or more for an annual percentage rate of 12%. Finance charges are computed on the daily outstanding balance of cash advances and on the entire previous balance of purchases of goods or services before deducting any payments made during the billing cycle. No finance charges are imposed on the purchase portion of the account balance when the previous month's balance is paid in full on or before the due date shown on the monthly statement. Under this method of calculating finance charges every extension of credit for purchases is available for a period of time without finance charges whether or not payment is deferred. The First National charges

no annual membership fee in connection with its program, and if the cardholder does not choose to defer payment or to obtain cash advances he pays nothing for the use of his First National BankAmericard/VISA card.

II-9. In comparison, the terms under the Marquette's BankAmericard/VISA program required a $10.00 per year membership fee regardless of whether payments on the account were deferred. Finance charges were charged on deferred payments at the rate of 1% per month (12% annual percentage rate). The finance charge was computed on the average daily balance of the cardholder's account during each monthly billing cycle, except that where the account balance was attributable solely to purchases of goods and services charged to the account during one billing cycle, and the account was paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge was charged on that balance. Under this method of calculating finance charges the only instance in which an extension of credit for purchases was available for any period of time without finance charges was when the entire account was paid within the first billing cycle after the extension of credit was made.

II-10. The rate structure of the First National's BankAmericard/VISA program results in lower charges to cardholders who do not defer payment or obtain cash advances (in which case no charges are made) or who defer payment or obtain cash advances but maintain low balances than did the rate structure of the Marquette's BankAmericard/VISA program which included the annual membership fee.

II-11. The business and activities of the Plaintiffs and Defendant in connection with the BankAmericard/VISA system, as alleged in paragraphs II-3 through II-10 involve the interstate trade and commerce of the United States.

II-12. In 1975 when First National and the Service Corporation attempted to offer the First National BankAmericard/VISA program and system to persons living in Minnesota the bank credit card business in Minnesota was dominated by Marquette. Upon Plaintiffs' information and belief, more than 80% of all bank credit cards issued to persons living in Minnesota were issued by Marquette, and Marquette in fact had an actual monopoly of all bank credit card business in the State of Minnesota.

II-13. Beginning in 1975 and continuing until through January of 1979, the Marquette, acting independently and in combination with its attorneys, officials of the State of Minnesota, and other persons presently unknown, embarked upon and continued a course of conduct with the purpose and intent of avoiding price competition in the bank credit card business in Minnesota. This course of conduct had the ultimate effect of preventing First National from introducing its BankAmericard/VISA program and competing with Marquette in Minnesota. This course of conduct included, but was not limited to, the following acts:

a. Marquette made demands upon First National that it stop advertising its plan in Minnesota as "Free" even though First National's solicitation materials clearly stated that First National's BankAmericard/VISA cards were "free" because no annual member-

ship fee was charged and no finance charges were made (except for cash advances) if accounts were paid currently.

b. Marquette attempted by various means to discourage banks and merchants in Minnesota from participating in the First National's credit card program; Marquette and others in combination with Marquette engaged in false and misleading disparagement of the First National's credit card program.

c. Marquette solicited and attempted to obtain the participation of National BankAmericard, Incorporated, the private licensing and regulatory body for the BankAmericard/VISA system, in preventing or prohibiting First National from entering the credit card market in Minnesota unless and until First National agreed to do so with the same rate structure as Marquette's program. In doing so, Marquette filed spurious complaints and solicited spurious complaints from cardholders to be filed with National BankAmericard Incorporated falsely claiming that First National's solicitation materials did not adequately identify the program offered by First National as its own. In fact First National's materials more prominently identified its program as that of First National than Marquette's materials identified its program as that of Marquette.

d. Marquette refused to permit Marquette BankAmericard/VISA cardholders to transfer their account balances to First National BankAmericard/VISA accounts with the purpose and effect of hindering and

discouraging their cardholders from converting to First National's program.

e. (1) In 1976, Marquette, in combination with its attorneys and others, was instrumental in the drafting and lobbying to passage of the Minnesota Bank Credit Card Act, Minn. Stat. § 48.185. Said Act purported to restrict the interest rates and charges assessed by national banks in connection with credit cards to 1% per cent per month (12% per annum) plus a maximum $15.00 annual fee. This Act also purported to allow any bank extending credit in a credit card program (of which Marquette was the only one in Minnesota) to sue to enjoin the operation of any program not conforming to that rate structure. The purpose and intent of securing the passage of such legislation was to provide Marquette with means by which it could prevent the First National's credit card program from being introduced into Minnesota and thereby to prevent effective price competition with the Marquette's credit card program.

(2) Marquette, itself being a national bank, and those working in combination with Marquette, were fully aware at all times that interest rates charged by national banks such as the First National are governed solely by the National Bank Act, Section 85 of Title 12, United States Code, and that the sole remedy against a national bank for exceeding the interest rates allowed by Section 85 is that provided in Section 86 of Title 12, United States Code. The Marquette and those working in concert with it were also fully aware that by reason of the Supremacy

Clause, Article VI, Section 2 of the United States Constitution, state law purporting to control interest rates of national banks is totally preempted by said federal statutes and that Minn. Stat. § 48.185 could not be constitutionally applied to the First National. The efforts of the Marquette and those workin concert with it to secure the passage of a state law which was unconstitutional and known to them to be unconstitutional as applied to national banks was not a legitimate exercise of Marquette's rights but constituted a sham to cover what was actually nothing more than an attempt to interfere directly with the business and business relationships of a competitor, the First National.

f. (1) Almost immediately following the effective date of Minn. Stat. § 48.185 and with full knowledge that said Act could not be constitutionally applied to the First National, the Marquette commenced an action in the Hennepin County District Court of Minnesota seeking, among other things, to invoke the injunctive provisions of Minn. Stat. § 48.185 against the First National's credit card program. By various procedural devices, the Marquette successfully prevented the removal of said action to the United States District Court where, by reason of pending and decided cases in the United States Courts of Appeal, the Marquette knew and feared it would receive a prompt decision adverse to its position.

(2) In the early stages of that litigation, the Marquette was fully aware that the United States Courts of Appeal for the Seventh and Eighth Circuits had

ruled that the National Bank Act, Section 85 of Title 12, United States Code, permitted a national bank to adopt an interest rate structure with respect to bank credit cards in the manner in which First National intended in Minnesota. See *Fisher v. First National Bank of Chicago,* 538 F. 2d 1284 (7th Cir. 1976) decided July 29, 1976, *cert. denied,* 429 U. S. 1062, and *Fisher v. First National Bank of Omaha,* 548 F. 2d 255 (8 Cir. 1977), decided January 28, 1977. Despite these decisions, the Marquette continued its spurious and vexatious litigation and was successful in securing from the Hennepin County District Court a temporary restraining order on December 22, 1976 and a permanent injunction on February 22, 1977 by which the First National and the Service Corporation were effectively restrained and enjoined from engaging in effective price competition with the Marquette in Minnesota. In addition, the Marquette successfully opposed First National's efforts on December 31, 1976 to secure, by writ of prohibition, a prompt determination of the issue in the Minnesota Supreme Court.

(3) Following an appeal, during which the permanent injunction was in effect, the Minnesota Supreme Court reversed the Hennepin County District Court holding, expressly and by necessary implication, that the National Bank Act, Section 85 of Title 12, United States Code, permitted the First National to structure its interest rates in the manner described in paragraph II-8 above and that Minn. Stat. § 48.185 was preempted by federal law and invalid as to the First National.

(4) Despite the decision of the Minnesota Supreme Court, the Marquette applied for, and was granted a stay of the effectiveness of the reversal, thereby leaving the injunction in effect, until such time as the Marquette could obtain a review in the United States Supreme Court. On December 18, 1978, the United States Supreme Court unanimously affirmed the Minnesota Supreme Court. Until that time and the date of the mandate issuing therefrom, the Marquette was successful in preventing the First National from conducting its credit card program in Minnesota.

(5) All of the above litigation was instigated and continued by the Marquette in concert with its attorneys and others not in the exercise of its legitimate rights but as a deliberate, malicious and successful sham and scheme, perpetrated in bad faith, for the sole purpose of preventing effective price competition from the First National.

g. In approximately July of 1978, the Marquette sold its BankAmericard/VISA credit card program to Town & Country Charge, a subsidiary or affiliate or entity related to the Continental Illinois National Bank of Chicago thereby reaping the benefit of having successfully forestalled the First National from effectively competing with Marquette and demonstrating that the previous conduct of Marquette alleged above was not in the exercise of legitimate rights but was instigated and continued in bad faith for the purpose of enhancing the value of Marquette's credit card program by preventing effective competition.

II-14. The acts alleged in paragraph II-13 constituted an unlawful combination and conspiracy to restrain trade in interstate commerce in the bank credit card business within the meaning of Section 1 of the Sherman Act, Section 1 of Title 15, United States Code.

II-15. The acts alleged in paragraph II-13 constituted an unlawful conspiracy to monopolize, attempt to monopolize and the achievement of a monopoly in the product market consisting of bank credit cards in the geographic market consisting of the State of Minnesota within the meaning of Section 2 of the Sherman Act, Section 2 of Title 15, United States Code.

II-16. By reason thereof, the plaintiffs have sustained injury to their business and property.

WHEREFORE, Plaintiffs pray for judgment against the Defendant on their First Claim for Relief in the amount of $6,000,000 and pray that said judgment be trebled as provided in Section 15 of Title 15, United States Code and that Plaintiffs have their attorney fees and costs of this action.

III. *Second Claim for Relief*

(Section 1983 of Title 42, United States Code)

III-1. Paragraphs I-1 through I-3, paragraphs II-3 through II-9, and paragraphs II-13 (f) and (g) are incorporated by reference in this Second Claim for Relief as if they had been set forth in full.

III-2. This Second Claim for Relief is brought under Section 1983 of Title 42, United States Code. The jurisdiction of the court is invoked under Sections 1331

(a) and 1332 (a) of Title 28, United States Code, the matter in controversy exclusive of interest and costs being in excess of $10,000, and under Section 1343 (4) of Title 28, United States Code.

III-3. First National, a national banking association, is governed exclusively by Federal law, Section 85 of Title 12, United States Code, with respect to the interest which it is permitted to charge on loans. This Federal law permits First National to charge interest on its loans at the rates allowed to lenders generally under the laws of Nebraska, the state in which First National is located. Accordingly, First National possesses a right, privilege, and immunity secured by Federal law to charge to its Bank Americard/VISA cardholders residing in Minnesota a finance charge determined in accordance with the laws of Nebraska.

III-4. First National as a national banking association is subject only to the remedies provided in Section 86 of Title 12, United States Code for interest charges in excess of those permitted to it by Section 85.

III-5. The Minnesota Credit Card Act, Minn. Stat. 48.185 (the Minnesota Act), in direct conflict with Federal law, Section 85 of Title 12, United States Code, purported to regulate the amount of finance charges which national banks such as First National could charge to Minnesota residents in connection with bank credit card programs such as the BankAmericard/VISA program.

III-6. The Minnesota Act in direct conflict with Section 86 of Title 12, United States Code, purported to authorize a bank extending credit in a bank credit card program (Marquette being the only bank in Minnesota doing

so on April 9, 1976, the effective date of the Act) and being in compliance with the rate structure prescribed by the Minnesota Act, to sue to enjoin the operation of the program of any other bank, such as that of First National, not in compliance with the rate structure of the Minnesota Act.

III-7. Under the purported authority of the Minnesota Act and, therefore, under the color of law of that Act, Marquette sued for and obtained a restraining order and permanent injunction in the District Court of Hennepin County, Minnesota enjoining First National's agent, Service Corporation, or any agent, officer or employee thereof, from soliciting residents of Minnesota for First National's BankAmericard/VISA program or from engaging in any other activity in connection with that program so long as it did not comply with the rate structure of the Minnesota Act.

III-8. Until reversed by a judgment of the Minnesota Supreme Court and affirmance of that judgment by a unanimous United States Supreme Court on December 18, 1979, the effect of the restraining order and injunction was to prevent Service Corporation and First National, under threat of contempt proceedings against its agents, officers, and employees who were also agents, officers or employees of Service Corporation, from introducing the First National's BankAmericard/VISA program in Minnesota and from exercising First National's right and privilege in connection therewith, secured by Federal law, Section 85 of Title 12, United States Code, to charge finance charges permitted by the laws of the State of Nebraska.

III-9. On behalf of, and in concert with Marquette, the Attorney General of the State of Minnesota, acting under color of law, joined in Marquette's injunction action as a plaintiff-intervenor in order to lend the assistance of the State of Minnesota to Marquette's own actions under the color of law of the Minnesota Act to deprive First National of its rights and privileges secured under Federal law, Section 85 of Title 12, United States Code.

III-10. By reason of the acts alleged in paragraphs III-6 through III-9 plaintiffs have been injured by the deprivation of their right and privilege secured by federal law to introduce the First National BankAmericard/VISA program in Minnesota under the Nebraska rate structure.

WHEREFORE, on this Second Claim for Relief, Plaintiffs pray for judgment against Defendant in the amount of $6,000,000, for their attorney fees, costs of this action, and for such other relief as the Court may deem proper.

VI. *Fifth Claim for Relief*

(Interference)

VI-1. Paragraphs I-1 through I-3, paragraphs II-3 through II-10, paragraphs II-12 through II-13 are incorporated by reference in this Fifth Claim for Relief as if they had been set forth in full.

VI-2. The jurisdiction of the court is invoked under Section 1332 (a) of Title 28, United States Code, the matter in controversy exclusive of interest and costs being in excess of $10,000, and under the doctrine of pendent jurisdiction.

VI-3. When First National and Service Corporation began their effort to introduce the First National Bank Americard/VISA program in Minnesota they had been successful in introducing the same program in the State of Iowa and in soliciting and obtaining persons living in that state as cardholders and in contracting with merchants and banks to participate in the program. Until prevented from soliciting cardholders, merchants and banks in Minnesota because of the acts of Marquette as alleged in paragraph II-13, First National was successful in acquiring approximately 30,000 cardholder accounts from persons living in Minnesota and had been contacted by Minnesota merchants and banks who had expressed interest in becoming participants in First National's BankAmericard/VISA program. First National and Service Corporation, therefore, had a reasonable expectancy of entering into additional relationships with Minnesota residents, merchants and banks.

VI-4. Marquette, at all times was aware of the reasonable expectancy of First National and Service Corporation of entering into such relationships.

VI-5. With the specific intent to prevent First National and Service Corporation from entering into such business relationships and to prevent price competition and thereby further its conspiracy to restrain trade and monopolize and its attempt to monopolize and its actual monopoly of the bank credit card business in the State of Minnesota, Marquette engaged in the course of conduct and the acts alleged in paragraph II-13.

VI-6. The acts of Marquette, as alleged, were without legal justification and were done for the purpose of and did prevent First National and Service Corporation

from introducing First National's BankAmericard/VISA program in the State of Minnesota and in connection therewith from contracting with prospective cardholders in that state on the basis of the Nebraska rate structure and in contracting with merchants and banks as participants in First National's program with the Nebraska rate structure.

VI-7. The acts of Marquette, as alleged, and the inability of First National and Service Corporation to enter into contractual relationships with Minnesota residents, merchants, and banks, as alleged, are the proximate cause of damages to the Plaintiffs' business and property believed to be in the amount of $6,000,000.

WHEREFORE, on this Fifth Claim for Relief, Plaintiffs pray for damages against Defendant in the amount of $6,000,000, for their attorney fees and costs herein, and for such other relief as the court deems proper.

FIRST NATIONAL BANK OF OMAHA
AND
FIRST OF OMAHA SERVICE CORPORATION, Plaintiffs,

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No. 80-1391

MAR 18 1981

ALEXANDER L. STEVAS, CLERK

IN THE

# Supreme Court of the United States

October Term 1980

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FIRST NATIONAL BANK OF OMAHA and FIRST OF OMAHA SERVICE CORPORATION,

*Petitioners,*

vs.

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,

*Respondent.*

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On the Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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## BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

I.

Is an anticompetitive intent or purpose, without more, sufficient to render lobbying and litigation activities actionable under the "sham exception" to the *Noerr-Pennington* Doctrine?

II.

Does the civil enforcement of a state statute limiting the rate of interest which national banks may charge in connection with bank credit card programs constitute the deprivation of any rights, privileges, or immunities secured by the Constitution or laws of the United States within the meaning of 42 U.S.C. §1983?

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IN THE

# Supreme Court of the United States

October Term 1980

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No. 80-1391

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FIRST NATIONAL BANK OF OMAHA and FIRST OF OMAHA SERVICE CORPORATION,

*Petitioners,*

vs.

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,

*Respondent.*

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On the Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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## BRIEF FOR RESPONDENT IN OPPOSITION

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## OPINIONS OF THE COURT BELOW

The opinion rendered in this matter by the United States Court of Appeals for the Eighth Circuit is reported as *First National Bank of Omaha v. The Marquette National Bank of Minneapolis,* 636 F.2d 195 (8th Cir. 1980). The opinion rendered in this matter by the United States District Court for the District of Minnesota is reported as *First National Bank of Omaha v. The Marquette National Bank of Minneapolis,* 482 F. Supp. 514 (D. Minn. 1979).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth by Petitioners, Respondent relies upon certain provisions of the First and Fourteenth Amendments to the Constitution of the United States:

*First Amendment*

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*Fourteenth Amendment*

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

## STATEMENT OF THE CASE

This lawsuit arises out of prior litigation involving the same parties, which prior litigation resulted in a decision by this Court. *See, The Marquette National Bank of Minneapolis v. First of Omaha Service Corporation,* 439 U.S. 299 (1978). *See also same case, The Marquette National*

*Bank of Minneapolis v. First of Omaha Service Corporation,* 262 N.W. 2d 358 (Minn. 1977), *cert. granted,* 436 U.S. 916 (1978). The factual and procedural history of the earlier litigation (hereinafter referred to as "the Injunction Suit") is discussed in the prior Opinion of this Court and will only be summarized below. *See,* 439 U.S. at 301-307.[1]

The Injunction Suit was commenced in May, 1976 by The Marquette National Bank of Minneapolis ("Marquette") in Hennepin County District Court, State of Minnesota. Marquette alleged that the First National Bank of Omaha ("First National"), by and through its wholly owned subsidiary, First of Omaha Service Corporation ("the Service Corporation"), was conducting a bank credit card program in the State of Minnesota in violation of the interest rate limitations of Minnesota's Bank Credit Card Act (M.S.A. §48.185). The Minnesota Attorney General intervened as a party plaintiff in the suit and joined Marquette in a motion for an injunction to prohibit the Service Corporation from engaging in any solicitation or other activity in connection with said credit card program so long as the program continued to be in violation of Minnesota's Credit Card Act. In February, 1977, the aforesaid motion of Marquette and the State of Minnesota was granted by the Hennepin County District Court and a permanent injunction was entered against the Service Corporation.

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[1]A copy of the appendix filed with this Court in the Injunction Suit, containing a true and correct printing of relevant documents from the lower court record in that suit, was submitted in support of the motion for partial summary judgment to the District Court in the present action as Exhibit 1 to the Affidavit of J. Patrick McDavitt, and was included in the record to the Eighth Circuit Court of Appeals in the present case (App. p. 31).

The Service Corporation appealed the permanent injunction to the Minnesota Supreme Court and, in November, 1977, after nearly eight months of deliberation, the Minnesota Supreme Court reversed the permanent injunction, in a decision which produced three dissents. 262 N.W. 2d 358. The majority opinion based the reversal on the view that under Section 85 of the National Bank Act (12 U.S.C. §85), and the judicially applied "most favored lender" rule, First National was authorized to operate its bank credit card program in Minnesota at the higher interest rate percentages permitted by the laws of the State of Nebraska. 262 N.W. 2d at 362-366. On Marquette's posting of a $10,000 bond (App. pp. 31-32), the Minnesota Supreme Court stayed the effectiveness of its decision until such time as review could be obtained in the United States Supreme Court (App. p. 65).

This Court granted review in the Injunction Suit upon separate petitions for writs of certiorari filed by Marquette and by the State of Minnesota. 436 U.S. 916. On December 18, 1978, this Court affirmed the decision of the Minnesota Supreme Court. 439 U.S. 299. This Court held that when First National enrolled Minnesota residents, merchants and banks in its bank credit card program, it continued to be "located" in the State of Nebraska for purposes of 12 U.S.C. §85 (439 U.S. at 309-313); and that, in connection with the operation of said program in the State of Minnesota, First National was authorized by §85 to charge the interest rate allowed under Nebraska law and was not limited to the interest rate established by Minnesota's Bank Credit Card Act (439 U.S. at 313-19).

Having ultimately succeeded before this Court in the Injunction Suit, the Service Corporation and its parent

corporation, First National, commenced the present action against Marquette alleging that, together with its lobbying for passage of Minnesota's Bank Credit Card Act, Marquette's pursuit of the Injunction Suit was a violation of the federal antitrust laws (15 U.S.C. §§1 and 2) and the Civil Rights Act of 1871 (42 U.S.C. §1983) and, is actionable under common law theories of malicious prosecution, abuse of process, and tortious interference with business (App. p. 55, *et seq.*).[2] More specifically, it is alleged that Marquette lobbied for passage of the Minnesota Bank Credit Card Act and pursued the Injunction Suit for the purpose and intent of "prevent[ing] the First National's credit card program from being introduced in Minnesota and thereby to prevent effective price competition with the Marquette's credit card program" (App. p. 62).

Marquette answered the Complaint in the present action by denying any improper motive or purpose in the pursuit of its aforesaid lobbying and litigation activities (App p. 38-40) and by asserting the affirmative defense that, even if such activities were motivated solely out of anticompetitive purposes, they are protected under the right of petition embodied in the First Amendment to the United States Constitution (App. p. 40-41). Shortly after filing its Answer, Marquette moved for an order dismissing the Complaint, or, in the alternative, for partial summary judgment on the grounds that, even assuming all the allegations in the Complaint to be true, neither First

[2]By electing not to seek review of the Court of Appeals' affirmance of summary judgment dismissing the causes of action for malicious prosecution and abuse of process (Petition at p. 4), First National and the Service Corporation have apparently decided to abandon those claims.

National nor the Service Corporation has a cause of action arising out of Marquette's lobbying for passage of the Minnesota Bank Credit Card Act, or upon Marquette's conduct of the Injunction Suit. On December 11, 1979, the District Court granted Marquette's motion for partial summary judgment (App. p. 10, *et seq.*). The Eighth Circuit Court of Appeals affirmed said partial summary judgment on November 25, 1980 (App. p. 1, *et seq.*).

## ARGUMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### I.

### The Decisions of the Courts Below Concerning the *Noerr-Pennington* Doctrine are Consistent with the Previous Decisions of This Court and the Court of Appeals in Other Circuits

The District Court relied on *Noerr-Pennington* considerations in holding that, to the extent Petitioners' claims are based upon Marquette's lobbying for passage of Minnesota's Bank Credit Card Act and its conduct of the Injunction Suit, Petitioners have no claim against Marquette either under the antitrust laws, the civil rights laws,[3] or the state common law theory of tortious interference with business (App. pp. 14-26, and p. 28). 482 F. Supp. at 517-22 and at 524-25. In its opinion affirming the District Court, the Court of Appeals adopted *in toto* the District Court's analysis of the *Noerr-Pennington* issues (App p. 3). 636 F. 2d at 197.

[3]In addressing Petitioners' Civil Rights Act claim, the District Court also cited the inapplicability of 42 U.S.C. §1983 to the factual setting pleaded in the Complaint (App. pp. 26-27). 482 F. Supp. at 522.

Petitioners assert that the courts below misinterpreted the decisions of this Court concerning the *Noerr-Pennington* Doctrine

> "by interpreting them as holding that improper intent or purpose in conducting lobbying or litigation is not a sufficient basis upon which to rest civil liability, but that in addition there must be a showing of repetitive, baseless litigation, unethical or abusive conduct, such as perjury, fraud or bribery, or conduct which bars meaningful access to adjudicatory tribunals." Petition, p. 11.

Under Petitioners' view, the presence of an anticompetitive purpose, without more, renders lobbying and litigation activities unlawful and outside the protection of the First Amendment right of petition. *Id.*

The most succinct response to First National's argument is found in the direct statements of the *Noerr-Pennington* Doctrine given in the namesake decisions rendered by this Court:

> *Eastern R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)
>
> "The fact . . . that the railroad's sole purpose in seeking to influence the passage and influence of laws was to destroy the truckers as competitors * * * even if adequately supported in the record, could not transform conduct otherwise lawful into a violation of the Sherman Act." 365 U.S. at 138-139.
>
> * * *
>
> "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot be made to depend upon their intent in doing so." *Id.* at 139.

*United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965)

> "Nothing could be clearer from the Court's opinion [in Noerr] than that anticompetitive purpose did not illegalize the conduct there involved." 381 U.S. at 669.
>
> * * *
>
> "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Id.* at 670.

The basic precept of *Noerr-Pennington* has been, and remains, as stated above. The lawful exercise of the right of petition is not rendered illegal merely because the motive or purpose of such activity is to attain some anticompetitive advantage. This Court reconfirmed this precept in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), wherein the constitutional protection afforded lobbying activities was also recognized as being equally applicable to the litigation activities:

> "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the anti-trust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." 404 U.S. at 510-11.

The act of petitioning government cannot, therefore, subject one to civil liability "even though intended to eliminate competition." *Pennington, supra,* 381 U.S. at 670.

It is, of course, an entirely different matter when one

not only pursues lobbying and litigation activities out of an anticompetitive motive but also engages in some abuse of the legislative or judicial process through one or more "forms of illegal and reprehensible practice which may corrupt [such] processes." *California Motor Transport, supra,* 404 U.S. at 513. This is the so-called "sham exception" to the *Noerr-Pennington* Doctrine. The specific "forms of illegal and reprehensible practice" referred to in *California Motor Transport* were the denial of "free and unlimited access" to governmental tribunals (*Id.* at 511); the existence of perjury, fraud or bribery (*Id.* at 512-13); or "a pattern of baseless, repetitive claims" (*Id.* at 513). Since the Complaint attributes none of these practices to Marquette, the District Court held that there was no basis to bring Marquette's lobbying and litigation activities within the "sham exception" to *Noerr-Pennington* (App. p. 24). 482 F. Supp. at 521.[4]

Petitioners' view, that the presence of an anticompetitive intent and purpose is, by itself, sufficient to invoke the "sham exception" to *Noerr-Pennington,* is not supported by *California Motor Transport.* Nor is Petitioners' view supported by any of the other decisions of this Court.

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[4]The District Court also correctly rejected any suggestion that Marquette did not have the constitutional right to pursue the Injunction Suit if, as alleged by Petitioners, it "knew" or should have known, in advance, that this Court would ultimately find Minnesota's Bank Credit Act to be preempted by §85 of the National Bank Act. Citing the Ninth Circuit's decision in *Subscription T.V. v. Southern California Theater Owners,* 576 F. 2d 230 (9th Cir. 1978), the District Court held that

> "Marquette was entitled to petition its state legislature for passage of an act (even if the act was considered unconstitutional by Marquette), and is not subject to the 'sham exception' absent some allegation of illegality in the legislative process or unethical abuse of the lobbying process." (App. p. 20). 482 F. Supp. at 519.

It is, of course, absurd to suggest that a suit which results in divided opinions among members of the Minnesota Supreme Court and is granted certiorari by this Court should be considered to be without any merit *ab initio.* 482 F. Supp. at 522-24.

Nor is there support for such a view in any of the numerous Court of Appeals' decisions which have faced the issue subsequent to *California Motor Transport.* This Court and the Court of Appeals have consistently held that, in order for lobbying and litigation activities to be actionable, something more than an anticompetitive intent must be present. *See, Otter Tail v. United States,* 410 U.S. 366, 380 (1973) ("repetitive lawsuits carrying the hallmark of unsubstantial claims"); *Vendo Co. v. Lektro Vend,* 433 U.S. 623, 635, fn. 6 (1977) ("repetitive, sham litigation");[5] *Semke v. Enid Automobile Dealers Assoc.,* 456 F. 2d 1361, 1366-67 (10th Cir. 1972) ("fraud, corruption or misuse of the state processes"); *Metro Cable Co. v. CATV of Rockford, Inc.,* 516 F. 2d 220, 232 (7th Cir. 1975) ("conduct that was not genuinely aimed at securing favorable governmental action but at discouraging competitors from seeking governmental action"); *Franchise Realty v. S.F. Loc. Joint Exec. Bd.,* 542 F. 2d 1076, 1084 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977) ("used the threat of litigation as a bludgeon in its attempts to retain its monopoly"); *Feminist Women's Health Center v. Mohammad,* 586 F. 2d 530, 543, fn. 6 (5th Cir. 1978), *cert. denied,* 444 U.S. 924 (1978) ("the petitioning was not a genuine effort to influence public officials to take governmental action"); *Hahn v. Codding,* 615 F. 2d 830, 840 (9th Cir. 1980)

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[5]The issue of whether a single, abusive lawsuit, as opposed to a "pattern of baseless, repetitive claims," is sufficient to come within the "sham exception" was addressed but left undecided in *Vendo.* This, however, does not provide a basis for review in the present case since the District Court held that, even assuming the pursuit of a single, abusive lawsuit could subject one to civil liability, there was no abuse of process in Marquette's pursuit of the Injunction Suit (App. pp. 21-24). 482 F. Supp. at 520-21.

("overlapping, repetitive, and baseless lawsuits"). *See also, Wilmonite, Inc. v. Eagan Real Estate, Inc.*, 454 F. Supp. 1124, 1131 (N.D. N.Y. 1977), *aff'd*, 578 F.2d 1372 (2d Cir. 1978), *cert. denied*, 439 U.S. 983 (1978) ("the corruption of the administrative or judicial process").

In applying *Noerr-Pennington* principles to Petitioners' alleged claims for violation of the Civil Rights Act and for tortious interference with business, the District Court did so on the basis that the First Amendment right of petition affords protection against such claims (when they are based upon lobbying and litigation activities) in the same manner as protection is afforded against antitrust claims (App. pp. 25-26 and p. 28). 482 F. Supp. at 521-22 and 524-25. The Court of Appeals affirmed (App. p. 3 and pp. 7-8, fn. 4). 636 F. 2d at 197 and 199, fn. 4.

While it is true that this Court has not rendered an opinion regarding the application of *Noerr-Pennington* principles to claims for violation of the Civil Rights Act or for tortious interference with business, the District Court's decision in this regard is supported by all of the lower courts which have faced the issue, including two cases in which this Court has denied review. *See, Stern v. United States Gypsum, Inc.*, 547 F. 2d 1329, 1344 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977) (civil rights claim brought under 42 U.S.C §1985); *State of Missouri v. National Organization for Women, Inc.*, 620 F. 2d 1301, 1316-19 (8th Cir. 1980), *cert. denied*, — U.S. —, 101 S. Ct. 122 (1980) (tortious interference with business claim); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614-15 (8th Cir. 1980) (civil rights claim brought under 42 U.S.C. §1983); *Sierra Club v. Butz*, 349 F. Supp.

934, 938 (N.D. Calif. 1972) (tortious interference with business claim); *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803, 816-818 (S.D. N.Y. 1979) (civil rights claim brought under 42 U.S.C. §1983); *Pennwalt Corp. v. Zenith Laboratories, Inc.*, 472 F. Supp. 413, 424 (E.D. Mich. 1979), *appeal dismissed*, 615 F. 2d 1362 (6th Cir. 1980) (tortious interference with business claim).

## II.

### The Circuit Court's Decision Regarding §1983 is Not in Conflict with *Maine v. Thiboutot*

The District Court's summary judgment and dismissal of Petitioners' Civil Rights Act claim was based on three alternative grounds: (1) "that the *Noerr-Pennington* immunity . . . should also be applied to a claim based upon §1983" (App. p. 25); (2) "that §85 of the National Bank Act [does not] secure 'a right, privilege and immunity' within the meaning of the Civil Rights Act" (App. p. 27); and (3) "that §1983 privides a cause of action only for deprivations of federal statutory rights which provide for 'equal rights' or 'the protection of civil rights' " (App. p. 27). 482 F. Supp. at 521-22.

In connection with the last of the above alternative grounds, the District Court did not have the benefit of this Court's decision in *Maine v. Thiboutot*, — U.S. —, 100 S. Ct. 2502 (1980), wherein it was held that the reach of §1983 is not limited to the deprivation of civil rights or equal protection laws. 100 S. Ct. at 2504-06. Cognizant of this clarification of the scope of §1983, the Court of Appeals cited the other two alternative grounds relied upon by the District Court in granting summary

judgment on the Civil Rights Act claim (App. pp. 5-7). 636 F. 2d at 198-99.

In their Petition for Certiorari herein, Petitioners contend that the Court of Appeals' decision is in conflict with *Maine v. Thiboutot*. Certainly this would be true if the Court of Appeals had affirmed the dismissal of the Civil Rights Act claim on the ground that causes of action under §1983 are limited to deprivation of civil rights or equal protection laws. However, as noted above, this ground was *not* the basis for the Court of Appeals' decision. The Court of Appeals recognized that federal laws which grant "rights, privileges or immunities" to the citizenry are within the scope of §1983; however, it also held that the *authority* given national banks to charge a certain rate of interest under 12 U.S.C. §85[6], is not "a right, privilege or immunity secured by federal law within the meaning of 42 U.S.C. §1983" (App. p. 5). 636 F. 2d at 198. This ruling is not in conflict with *Thiboutot*.

The Court of Appeals also noted that Petitioners' Civil Rights Act claim could also be denied on *Noerr-Pennington* principles:

> "The interests in protecting citizens' right of petition and free speech that were found to outweigh the statutory restrictions in [antitrust] cases seem equally as strong here and could provide an alternative ground for immunizing Marquette from penalty under Section 1983." (App. p. 8, fn. 4). 636 F. 2d at 199, fn. 4.

As discussed earlier herein, other lower courts have similarly applied *Noerr-Pennington* to §1983 claims. By ap-

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[6]*See, The Marquette National Bank of Minneapolis v. First of Omaha Service Corporation*, 439 U.S. 299, 301 (1978).

plying *Noerr-Pennington* to the Civil Rights Act claim, any issue as to whether §85 of the National Bank Act confers a statutory "right, privilege or immunity" within the meaning of §1983 is rendered moot.

## CONCLUSION

Based on the foregoing, it is respectfully submitted that the petition for a writ of certiorari be, in all things, denied.

Respectfully submitted.

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